IN THE COURT OF APPEALS OF IOWA

No. 2-470 / 11-1843
Filed October 31, 2012

ROWENE F. BOSSART,
Plaintiff-Appellee,

vs.

CENTRAL FREIGHT LINES, INC.,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Carla T. Schemmel, Judge.

Tenant appeals a district court's judgment entry for landlord on landlord's action for recovery of past unpaid rent and future rent as damages under an acceleration clause in the parties' lease. **AFFIRMED AS MODIFIED.**

Benjamin P. Roach and Ryan G. Koopmans of Nyemaster Goode, P.C., Des Moines, for appellant.

Kimberly P. Knoshaug and R. Jeffrey Lewis of Lewis, Webster, Van Winkle & Knoshaug, L.L.P., Des Moines, for appellee.

Heard by Vaitheswaran, P.J., Bower, J., and Miller, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

BOWER, J.

Tenant Central Freight Lines, Inc. appeals a district court's judgment entry for landlord Rowene Bossart on Bossart's action for recovery of past unpaid rent and future rent as damages under an acceleration clause in the parties' lease agreement. Central Freight contends the district court erred in: (1) finding the lease agreement contained an acceleration clause, (2) finding Bossart mitigated her damages, (3) failing to find Central Freight's lease was constructively terminated, and (4) miscalculating future damages.

Upon our review we find the parties' lease agreement does not contain an acceleration clause. However, Bossart exercised reasonable diligence in attempting to lease the property to mitigate damages, and the lease was not constructively terminated. Accordingly, Bossart is entitled to the amount of past due rent at the time of trial in the amount of $109,920. In light of our findings, we need not address Central Freight's contention in regard to future damages. We affirm as modified.

I. Background Facts and Proceedings.

This case involves a portion of the motor freight terminal owned by Rowene Bossart located on East Ovid Avenue in Des Moines. The terminal was formerly owned by Fed Ex Freight East, Inc. In 2002, Central Freight entered into a lease agreement with Fed Ex, beginning November 1, 2002, and ending October 31, 2004. Under the lease, Central Freight would rent docks and related office and parking space at the terminal for the first year for $2750 per month,

and more docks and related office and parking space for the second year for $5000 per month.

The lease set forth that "abandonment or vacation" of the property by Central Freight "shall constitute a material default and breach" of the lease. The lease further provided:

> **21. LESSOR'S REMEDIES:** In the event of any such material default or breach of LESSEE, at any time thereafter without limiting LESSOR in the exercise of any right or remedy at law or in equity which LESSOR may have by reason of such default or breach:
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> > **(a)** LESSOR shall have the immediate right of re-entry and possession of the Leased Premises, which right remains continuous until such time as LESSEE shall have cured such default. Notwithstanding such re-entry and possession of the Leased Premises by LESSOR, LESSEE shall remain liable for the rent and other sums payable hereunder whether or not the Leased Premises are relet by LESSOR and for all expenses which LESSOR may incur in reletting the Leased Premises and repairing and maintaining the same less such proceeds, if any, which may result from the reletting of the Leased Premises.

In June 2003, Fed Ex sold the terminal property to Bossart. On June 19, 2003, Fed Ex, Bossart, and Central Freight entered a written addendum to the lease, which set the term of the lease from June 1, 2003, to May 31, 2013; substituted Rowene Bossart as the lessor; and increased the monthly rent to $6440 for the first five years and $6940 for the second five years of the agreement. All other terms of the lease remained in effect.

In March 2008, Estes Express Lines also began renting docks at the terminal from Bossart. The Estes lease had a three-year term ending on April 30, 2011, at increasing monthly rental rates of $6510, $6560, and $6635.

In December 2008, Bossart learned Central Freight was vacating the terminal property. Central Freight did not mail a written notice to Bossart. The terminal manager, however, called Bossart's husband and informed him Central Freight was leaving. On January 1, 2009, Bossart received what would be Central Freight's final payment.

Beginning in February 2009, Bossart made efforts to relet Central Freight's space. Bossart advertised the property in the Des Moines Register, placed a large sign on the fence facing the street, and listed the property with a broker who advertised the property nationwide. Despite these efforts, Bossart did not receive a single offer.

In March 2009, Bossart's attorney sent a letter to Central Freight requesting that certain maintenance be done on the property Central Freight was renting. The letter further stated, in part: "It is Mrs. Bossart's understanding that Central has vacated the leased premises. If that is the case, the vacation of the lease premises constitutes a material default and breach by Central of the Lease Agreement pursuant to Section 20 of the Lease Agreement."

On April 3, 2009, Bossart brought a breach of contract action against Central Freight seeking recovery of past unpaid rent, rent for the remaining term of the lease, and costs to repair physical damage to the property. A default judgment was entered against Central Freight in June 2009. In August 2009, Central Freight filed a motion to set aside default judgment, alleging the petition and original notice were "not received by individuals in the appropriate department of the Company." Bossart resisted Central Freight's motion.

Following a hearing, the court entered an order finding good cause existed to set aside the default judgment and the court vacated the judgment previously entered.

In September 2009, Bossart filed a motion for summary judgment. In March 2010, following a hearing, the court entered an order concluding issues of material fact existed that precluded entry of summary judgment and the court denied Bossart's motion.

Meanwhile, in February 2010, Estes agreed to amend its lease with Bossart to also include the docks abandoned by Central Freight. Estes's amended lease commenced on March 1, 2010. Estes' monthly rent obligation, however, increased by only $2015.[1]

Trial was held in June 2010, and the court entered its ruling in December 2010. The court concluded Central Freight had breached its lease agreement with Bossart "by abandoning the property and failing to pay rent beginning in February 2009." The court further found "Bossart mitigated her losses by reletting the property but was collecting $4620 per month less than she would have pursuant to the Central Freight lease." The court determined the lease contained an acceleration clause, and that Bossart was entitled to recover damages in the amount of $286,325. The court reached this award by finding Bossart was entitled to the full amount of rent on the property for the remainder of the lease: $360,880 ($6940 per month for fifty-two months), reduced by the amount Bossart collected from Estes after Estes leased the portion of the

[1] The lease included two optional one-year extension periods where, if exercised, Estes' rent would increase by $2165 in the second year, and $2315 in the third year.

property covered by Central Freight's lease: $74,555 ($2015 per month for thirty-seven months).

Bossart subsequently filed an application for attorney fees, which Central Freight resisted. Central Freight filed a combined motion to amend, enlarge, modify, or vacate the judgment and motion for new trial. Following a hearing, the court entered an order denying Central Freight's motion and granting Bossart attorney fees in the amount of $20,000. Central Freight now appeals.

II. Scope and Standard of Review.

Bossart's action against Central Freight for damages under the lease is an action at law. *Aurora Bus*. *Park Assocs., L.P*. *v*. *Michael Albert, Inc*., 548 N.W.2d 153, 157 (Iowa 1996); *GreatAmerica Leasing Corp*. *v*. *Star Photo Lab, Inc*., 672 N.W.2d 502, 504 (Iowa Ct. App. 2003). Accordingly, we review the judgment of the district court for correction of errors at law. Iowa R. App. P. 6.907. We are not bound by the district court's legal conclusions and application of legal principles. *NevadaCare, Inc*. *v*. *Dep't of Human Services*, 783 N.W.2d 459, 465 (Iowa 2010). "We will reverse a district court's judgment if we find the court has applied erroneous rules of law, which materially affected its decision." *Id*. The district court's findings of fact are binding on us, however, if they are supported by substantial evidence. *Id*.

III. Acceleration Clause.

Central Freight concedes it "is liable for some past due rent." Central Freight argues, however, that the lease agreement at issue in this case does not contain an acceleration clause, and that Central Freight "is legally obligated for

past due rent only as it accrues." Specifically, Central Freight alleges paragraph 21 of the lease agreement "contains no express, unambiguous acceleration clause or even words that could suggest a right to accelerate rent not yet due." Bossart disagrees, and states that in order to give paragraph 21 "any meaning at all, it must mean that Central Freight is immediately liable for all rent, less mitigation, if Ms. Bossart retakes possession of the property due to Central Freight's default."

"[A] landlord is entitled to damages equal to the amount of rent reserved in the lease, plus any other consequential damages, less amounts received in reletting the property." *Aurora*, 548 N.W.2d at 157. In acknowledging an acceleration clause as a valid remedy for a landlord when a tenant is in breach of a lease agreement, our supreme court has reiterated: "'The parties may provide in the lease that if the tenant defaults in the payment of rent or fails in some other way to perform his obligations under the lease, the total amount of rent payable during the term of the lease shall immediately become due and payable.'" *Id*. at 155 (quoting Restatement (Second) of Property *Landlord & Tenant* § 12.1 cmt. k (1977)).

With these principles in mind, we turn to the facts of this case. The provision at issue here, paragraph 21, provides:

> **21. <u>LESSOR'S REMEDIES:</u>** In the event of any such material default or breach of LESSEE, . . . LESSOR shall have the immediate right of re-entry and possession of the Leased Premises, which right remains continuous until such time as LESSEE shall have cured such default. Notwithstanding such re-entry and possession of the Leased Premises by LESSOR, LESSEE *shall remain liable for the rent and other sums payable hereunder whether or not the Leased Premises are relet* by LESSOR and for

> all expenses which LESSOR may incur in reletting the Leased Premises and repairing and maintaining the same *less such proceeds*, *if any*, *which may result from the reletting of the Leased Premises*.

(Emphasis added.) "In the construction of written contracts, the cardinal principle is that the intent of the parties must control, and except in cases of ambiguity, this is determined by what the contract itself says." Iowa R. App. P. 6.904(3)(n); *Peak v*. *Adams*, 799 N.W.2d 535, 543 (Iowa 2011).

Upon our review of the parties' lease agreement, we do not find that the operative language of paragraph 21 constitutes an acceleration clause. As the parties agree, paragraph 21 holds Central Freight liable for rent as it accrues. Paragraph 21 does not, however, make "the total amount of rent payable during the term of the lease . . . immediately . . . due and payable." *Aurora*, 548 N.W.2d at 155; *see also* Restatement (Second) of Property *Landlord & Tenant* § 12.1.

Bossart filed this action on April 3, 2009, seeking damages for "past rent and taxes, future rent and taxes . . . ." Because the lease agreement contains no acceleration clause, Bossart was entitled only to the amount of rent due that had accrued at the time of trial. *See Prudential Ins. Co. of Am. v. Buss*, 37 N.W.2d 300, 301 (Iowa 1949) ("No suit will lie for rent that has not accrued."). Bossart received Central Freight's final payment on January 1, 2009. Trial was held on June 3, 2010. Accordingly, Bossart is entitled to past due rent in the amount of $109,920 ($6940 x 13 months + $4925 x 4 months).

IV. Mitigation of Damages.

Central Freight next contends Bossart failed to mitigate her damages. Specifically, as Central Freight sets forth, "Bossart unsuccessfully attempted to

find a tenant for the terminal for a period of one year in a recessionary economy" and then agreed "to accept a commercially unreasonable rental rate from Estes."[2]

"In Iowa 'we are committed to the doctrine that when a tenant wrongfully abandons leased premises, the landlord is under a duty to show reasonable diligence has been used to relet the property at the best obtainable rent and thereby obviate or reduce the resulting damage.'" *Aurora*, 548 N.W.2d at 157 (quoting *Vawter v*. *McKissick*, 159 N.W.2d 538, 541 (Iowa 1968)). The landlord is not "required to adopt any specific method in endeavoring to relet the property," but has the burden "to show diligence in reletting the property." *Harmsen v*. *Dr*. *MacDonald's, Inc*., 403 N.W.2d 48, 51 (Iowa Ct. App. 1987).

Here, Central Freight vacated the terminal premises in December 2008 and made its final rental payment in January 2009. Beginning in February 2009, Bossart made efforts to relet Central Freight's space. Testimony was entered at trial to show that Bossart: advertised the property in the Des Moines Register, offered a finder's fee to several individuals for incentive to find a tenant, personally called over forty companies, placed a large "for rent" sign on the fence facing the street, and listed the property with a broker who advertised the property nationwide.

Despite these efforts, Bossart did not receive a single offer until March 2010—when Bossart's other tenant, Estes, agreed to lease the docks previously

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[2] Although we find Bossart reasonably mitigated her damages up to, and including, Estes' leasing the remainder of the property, only Bossart's actions in mitigating her damages during the period of three months preceding the commencement of this action are specifically applicable for our purposes.

leased to Central Freight. Even then, although Estes had begun leasing the docks, it was for a much lower rental price than Central Freight had agreed to pay. The district court considered the evidence presented and determined Bossart had reasonably mitigated her damages: "It is clear to this Court that Bossart took reasonable and proper steps in reletting the property, but was unable to relet the property until March of 2010, when she leased the portion of the facility previously leased to Central Freight for $4,620 less per month."

We agree with the district court's finding that Bossart reasonably mitigated her damages. *See, e.g., Aurora*, 548 N.W.2d at 155 (affirming district court's finding that landlord "had used reasonable diligence in attempting to relet property" even where landlord was unsuccessful at reletting the property for the remaining three years of the lease term); *Harmsen*, 403 N.W.2d at 52 (agreeing with district court's determination that landlord "exercised reasonable diligence in attempting to lease the property to mitigate damages" where landlord listed ads in two local newspapers and an agricultural magazine, erected several "for rent" signs on the property "though the signs were not particularly large or eye-catching," but did not list the property for sale at any time). We also acknowledge the record is replete with testimony from both parties stressing "the depressed economic conditions" that challenged the trucking industry throughout this case. We affirm as to this issue.[3]

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[3] Central Freight further argues that even if Bossart did mitigate her damages, Central Freight's lease "was constructively terminated on March 1, 2010," when Bossart leased Central Freight's docks to Estes. Central Freight also raises several claims of error in regard to the district court's calculation of Bossart's future damages. In light of our previous findings, we need not address these issues.

V. Attorney Fees.

Central Freight claims the district court erred in awarding attorney fees to Bossart because "[i]f the district court's judgment is reversed," then Bossart is not "the prevailing party in this case." We have determined Bossart can recover from Central Freight under the terms of the parties' lease agreement. As the lease provides: "If either party commences an action against the other party arising out of or in connection with this Lease Agreement, the prevailing party shall be entitled to have and recover from the losing party reasonable attorney's fees and costs of suit." We conclude the district court properly awarded attorney fees that were permitted under the lease agreement.

VI. Appellate Attorney Fees.

Bossart seeks attorney fees for this appeal. "When judgment is recovered upon a written contract containing an agreement to pay an attorney fee, the court shall allow and tax as a part of the costs a reasonable attorney fee to be determined by the court." Iowa Code § 625.22; *see Midwest Hatchery & Poultry Farms, Inc*. *v*. *Doorenbos Poultry, Inc*., 783 N.W.2d 56, 66 (Iowa Ct. App. 2010). In light of Central Freight's prevailing argument on appeal, we decline to award appellate attorney fees.

VII. Conclusion.

Upon our review, we do not find the parties' lease agreement contains an acceleration clause. However, Bossart exercised reasonable diligence in attempting to lease the property to mitigate damages, and the lease was not constructively terminated. Accordingly, Bossart is entitled to the amount of past

due rent at the time of trial, in the amount of $109,920. In light of our findings, we need not address Central Freight's contention in regard to future damages. We affirm the district court's award of trial attorney fees, and do not award appellate attorney fees.

AFFIRMED AS MODIFIED.