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STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1275

CJMA Financial Corporation,
Respondent,

vs.

1100 Nicollet Mall L.L.P.,
defendant and third party plaintiff,
Appellant,

vs.

David Polacek,
third party defendant,
Respondent.

Filed August 5, 2008
Affirmed in part and reversed in part
Schellhas, Judge

Hennepin County District Court
File No. 27-CV-06-4666

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Considered and decided by Hudson, Presiding Judge; Shumaker, Judge; and Schellhas, Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant-landlord challenges the portion of a district court's order granting respondent-tenant's motion to enforce the parties' on-the-record settlement agreement. Appellant argues that the district court improperly altered the terms of the agreement by determining that appellant had waived its claim to custodial charges and by adopting respondent's measurement of its leased premises. Because a provision in the parties' lease agreement precludes waiver in the absence of a writing and is contrary to the district court's determination on the issue of custodial charges, we reverse in part. But because nothing in the record contradicts respondent's measurement method or its adoption by the district court, we affirm in part.

FACTS

This appeal arises out of a breach-of-lease dispute between respondent CJMA Financial Corporation (tenant) and appellant 1100 Nicollet Mall L.L.P. (landlord).

In 2003, tenant entered into a ten-year lease agreement with landlord for 2,739 square feet of office space. In early 2006, tenant brought a declaratory-judgment action against landlord, alleging that it had relied to its detriment on landlord's reneged promise to take over tenant's sublet space and to revise its lease. Landlord counter-sued tenant's president, respondent David Polacek, claiming that Polacek is personally liable for any monetary amount awarded to landlord for tenant's alleged breach of the lease.[1]

[1] Because CJMA Financial Corporation and Polacek were and are represented by the same attorney, they will be referred to collectively as "tenant" unless otherwise required.

Landlord moved for summary judgment and tenant moved for partial summary judgment. By order filed February 23, 2007, the district court denied landlord's motion and granted tenant's motion with respect to the percentage share of real property taxes and common operating expenses and to the net rentable floor area of landlord's building. The district court did not order entry of the judgment, however, "as all claims between the parties have not been settled."

Days later, the parties "reached settlement on all issues and in total resolution of the case." Counsel for tenant read the settlement terms into the district court record, which provided in relevant part:

> [Tenant] will give back a portion of its space that is referred to in a document that the parties have drawn a demising wall as to where that space will be given back to.
>
> . . . .
>
> Along with the give back of space, there will be a remeasurement of the actual floor area of the premises. And the square footage of the floor will be increased by an RU [rentable/usable] factor of 13% to arrive at the total square footage upon which [tenant]'s remaining lease obligations will be calculated.
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> . . . .
>
> And the overcharge or credit of the common area maintenance with respect to the past for year . . . 2004, 2005 and 2006 are agreed to be $48,600, and that amount will be applied as a rent credit going forward.

Counsel for landlord confirmed that he had no additions or clarifications to the stated settlement and that tenant's counsel had "caught everything that we talked about." Both parties affirmed that "all remaining claims will be dismissed in consideration of the settlement[.]"

Despite their on-the-record settlement agreement, the parties were unable to draft a mutually agreeable written settlement agreement and asked the district court for assistance in resolving several disputed terms.

Landlord disagreed in relevant part with Polacek's insistence on "measur[ing] his retained space . . . from inside wall to inside wall" instead of "from property line to property line." Landlord argued that the industry standard for measuring square footage is to use the Architectural Institute of America (AIA) "as built" drawings, not the Building Owners and Managers Association (BOMA) practice of physical measurement. According to landlord's calculations, the revised total square footage of tenant's leased premises is 1,988 square feet: the actual floor area of 1,760 square feet, measured according to the building's architectural drawings, multiplied by an RU factor of 13 percent.

Tenant countered by providing the district court with detailed drawings of Polacek's tape measurements and claiming that after the on-the-record settlement agreement, landlord's representative, Gene Purdy, was invited to participate in the measuring process but declined. Tenant asserted that the revised total square footage is actually 1,793 square feet: the actual floor area of 1,587, measured from the inside walls, multiplied by the RU factor of 13 percent.

In addition, tenant disagreed with landlord's claim to $20,137.93 for past custodial charges. Tenant argued that "[i]t was the intent of the parties that the $48,600 credit was to compensate for all past overcharges," noting that "[t]he 2006 custodial charges were specifically subsumed in" that amount. Tenant asserted that during settlement

negotiations, landlord "[n]ever requested or disclosed that it intended to leave open its ability to bill or charge for custodial expenses" and never mentioned that it was entitled to custodial charges from 2004 and 2005. Landlord countered that the $20,137.93 for past custodial charges is a separate charge because it "[wa]s not set forth on the record as affirmed by [tenant]" and "is not part of any disputed common area charges" resolved by the $48,600 overcharge-credit.

At a hearing, the district court recited the issues for resolution but did not hear arguments from counsel. The district court clarified for the record that the parties had made verbal motions to enforce the settlement agreement during a pre-hearing chamber's conference. On the court's suggestion, the parties agreed to an expedited timeline for decision.[2]

By order filed April 30, 2007, the district court concluded in relevant part that landlord had waived its claim to $20,137.93 for past custodial charges because that amount was not an explicit term of the parties' on-the-record settlement agreement. The district court did not make a specific finding on this issue, so it is unclear whether it accepted tenant's argument that the charge was included in the $48,600 overcharge-credit. In addition, the district court adopted tenant's measurement of its leased premises, concluding that "[t]he only logical way to measure the 'actual floor area,' as agreed upon

[2] Tenant's attorney was scheduled to move to a new firm that had a conflict of interest in representing Polacek in this matter. Both parties waived the briefing schedule provided under the Minnesota Rules of Civil Procedure and agreed to move forward on submissions to the district court.

by the parties, would be with a tape measure from wall to wall," resulting in a revised total square footage of 1,793 square feet.

This appeal from landlord follows.

D E C I S I O N

Landlord contends that the district court improperly altered the terms of the parties' on-the-record settlement agreement. This court reviews a district court's decision on a motion to enforce a settlement agreement under an abuse-of-discretion standard. *Johnson v. St. Paul Ins. Cos.*, 305 N.W.2d 571, 573 (Minn. 1981) (stating that district court has discretion to vacate settlement stipulation, a decision that will not be reversed unless arbitrary).

"Settling suits without trial is greatly favored, and such agreements will not lightly be set aside by Minnesota courts." *Beach v. Anderson*, 417 N.W.2d 709, 711-12 (Minn. App. 1988), *review denied* (Minn. Mar. 23, 1988). Settlement agreements are contractual and subject to contract law principles. *Id.* at 711; *Ryan v. Ryan*, 292 Minn. 52, 55, 193 N.W.2d 295, 297 (1971) (stating that "a full and enforceable settlement requires offer and acceptance so as to constitute a meeting of minds on the essential terms of the agreement"). If the parties dispute the settlement agreement, the district court may determine what the facts are. *Jallen v. Agre*, 264 Minn. 369, 373, 119 N.W.2d 739, 743 (1963); *see also* Restatement (Second) of Contracts § 204 (2007) (providing that courts may supply reasonable terms in situations where parties to a contract have not agreed on essential terms).

I. Custodial Charges

Landlord challenges the district court's conclusion that $20,137.93 in past custodial charges was not explicitly agreed to as part of the parties' on-the-record settlement agreement and therefore was waived. Landlord argues that such charges were not part of the disputed portions of the lease and were "not even a subject of the Litigation," so the absence of those charges from the settlement agreement does not mean that landlord waived its claim to them. Tenant counters that waiver was a proper determination because: (1) the parties discussed but did not agree to payment of past custodial charges; (2) the claimed custodial charges were not clearly included in the on-the-record settlement agreement; and (3) landlord affirmed on the record that it had no additions or modifications to the stated settlement.[3] We disagree with tenant's position.

"[G]enerally, a settlement covers only those claims or rights that are specifically mentioned in the agreement." *Johnson v. Tech Group, Inc.*, 491 N.W.2d 287, 288 (Minn. 1992). Both parties admit that past custodial charges were not included in the on-the-record settlement agreement and that those charges were never claimed as part of this dispute. "In contract law, a waiver is defined as an *intentional* relinquishment of a known right, and it must clearly be made to appear from the facts disclosed." *Hauenstein & Bermeister, Inc. v. Met-Fab Indus., Inc.*, 320 N.W.2d 886, 892 (Minn. 1982) (quotation

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[3] Tenant abandons its previous argument that the custodial charges were included in the $48,600 overcharge-credit. That argument is contradicted by the on-the-record settlement agreement, which explicitly provides that "the overcharge or credit of the *common area maintenance* . . . for year[s] 2004, 2005 and 2006 are agreed to be $48,600." (Emphasis added.) According to the parties' original lease agreement, common area maintenance charges are provided for in paragraph 8 and are distinct from custodial charges, which fall under paragraph 16.

omitted). Thus, contrary to the district court's conclusion, landlord's claim to custodial charges is not waived merely because the on-the-record settlement agreement did not reach that issue. *See In re Pfenninger's Estate*, 135 Minn. 192, 197, 160 N.W. 487, 490 (1916) ("A receipt in full of all claims and demands, given as evidence of such settlement [of disputed matters], does not conclude the parties as to a claim which affirmatively appears not to have been included in the settlement negotiations.").

Moreover, both parties seem to ignore the anti-waiver provision in their own lease agreement. Paragraph 43 of the parties' original lease provides that "[t]his Lease may not be amended, modified or supplemented except by a writing duly and properly executed, and *no term, condition or covenant hereof may be waived other than by such a writing*." (Emphasis added.) Custodial charges are addressed in paragraph 16 of the lease—a provision that has not been challenged at any stage of this litigation and that is still a valid and binding term of the parties' ongoing lease agreement. As such, it is a term that cannot be waived in the absence of some sort of writing. No such writing exists, and, on this record, we decline to infer that the parties waived the anti-waiver provision of their lease. Thus, because the parties did not resolve the term in their on-the-record settlement agreement, the district court abused its discretion in determining that landlord waived its claim to $20,137.93 for past custodial charges.

II. Remeasurement of Leased Premises

Landlord also challenges the district court's determination that the revised total square footage of tenant's leased premises is 1,793 square feet, based on tenant's tape measurement of the actual floor area. Landlord argues that tenant's measurement,

obtained according to the BOMA standard of using a tape measure to measure the space between the interior walls, was improper. According to landlord, the "industry standard for measuring space is to use [AIA] 'as built' drawings" and to measure the perimeter of the space, a method which landlord claims was used from the inception of the parties' lease. But, contrary to landlord's assertion, there does not seem to be any one industry standard for measuring space for purposes of determining a tenant's lease obligation. "There are no standard definitions for calculating rentable area. The Building Owners and Managers Association (BOMA) promulgates a standard method for measuring floor area in offices, but landlords are free to adapt it to their own needs." John S. Hollyfield, *Space Measurement* at 125, *in Commercial Real Estate Leases* (ALI-ABA 2007). BOMA's method involves calculating rentable square feet, which involves "usable square feet, i.e., *the space the tenant can carpet*, plus whatever else the landlord wishes to include." Victoria Eve de Gannon, *Playing the Leasing Numbers Game: A Tenant's Analysis of Rent, Escalation, and Operating Expense Provisions*, 21 Real Estate L.J. 239, 241-42 (1993) (emphasis added).[4]

More significantly, and also contrary to landlord's assertion, we cannot find any evidence in the record as to the particular method used to arrive at the original physical

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[4] We also note that according to an article in the *Washington Business Journal*, "[t]here are a number of rentable square footage measurement standards commonly used in the commercial real estate market. Each method, if used on the same space, would result in a different rentable square foot number." Richard Fanelli, *How Big is a Square Foot? Depends on the Audience*, Wash. Bus. J., Apr. 9, 2004, http://www.bizjournals.com/washington/stories/2004/04/12/focus12.html. The BOMA standard "is the prevalent standard for measuring leased office space in the United States" and starts with measuring the gross area within "the dominant inside line of the building, which may be the glass line or an inside solid wall of the building." *Id*.

square footage of tenant's leased premises. The record is devoid of any indication that either party measured the leased premises before entering into the original lease agreement. We also note that landlord had the opportunity to clarify this issue when its representative was invited by tenant to participate in the measuring process, but declined to do so.

A contract term should be interpreted according to its actual plain language. *Kauffman Stewart, Inc. v. Weinbrenner Shoe Co.*, 589 N.W.2d 499, 501-502 (Minn. App. 1999). Under the plain language of the parties' on-the-record settlement agreement, tenant measured the "actual floor area" according to an accepted method within the commercial real estate market. On this record, we cannot say that the district court abused its discretion in adopting tenant's measurements.

In sum, we reverse the district court's determination that landlord waived its claim to $20,137.93 for past custodial charges. But we affirm the district court's ruling that the total square footage of tenant's leased premises is 1,793 square feet.

Affirmed in part and reversed in part.