COURT OF APPEALS
DECISION
DATED AND RELEASED

January 22, 1997

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

NOTICE

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No. 95-3507

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

DECADE 80-I, LTD.,
JEFFREY KEIERLEBER,
its general partner,

Plaintiff-Respondent,

v.

PDQ FOOD STORES, INC.,
OF MADISON and
NASH-FINCH COMPANY,

Defendants-Appellants.

APPEAL from a judgment of the circuit court for Washington County: LEO F. SCHLAEFER, Judge. *Reversed and cause remanded*.

Before Snyder, P.J., Nettesheim and Anderson, JJ.

PER CURIAM. PDQ Food Stores, Inc., of Madison and Nash-Finch Company (hereinafter, PDQ) appeal from a judgment awarding Decade 80-I, Ltd., damages for the breach of a commercial lease. PDQ argues that it had the right to terminate the lease because of Decade's failure as the landlord to maintain the parking lot, to pay real estate taxes, and to obtain PDQ's consent before developing "outlots." It also contends that the trial court's finding that

Decade fulfilled its duty to mitigate damages is clearly erroneous. We reverse the trial court's determination that Decade had more than thirty days to cure defaults with respect to parking lot maintenance. Because an issue of fact exists as to whether potholes in the parking lot constituted a breach of the lease and whether construction on the outlots reduced the number of parking spots, we reverse the judgment and remand for further proceedings.

Commencing December 7, 1979, Nash-Finch leased commercial space in the Washington Square Shopping Center in Germantown for a twenty-year period. Decade became the owner of the shopping center in 1981. In May 1986, Nash-Finch assigned its leasehold to PDQ. The space was used to operate a food store.

In 1991, Decade sold one of the shopping center's "outlots" to the Federated Bank and a branch bank office was constructed there. In October 1992, another "outlot" was sold for the construction of a McDonald's restaurant.

By a letter of May 26, 1992, PDQ informed Decade that the sale to Federated Bank without PDQ's approval was a breach of paragraph 12 of the lease.[1] A letter of October 28, 1992, notified Decade of additional defaults under the lease. PDQ asserted that paragraphs 3 and 8 had been violated by the existence of delinquent real estate taxes and special assessments for 1990 and 1991 and by Decade's failure to maintain the parking lot as exhibited by

[1] Paragraph 12 provided:

> Landlord expressly agrees that commencing with the execution of this Lease and continuing for the entire initial term and any renewal term of this Lease, Landlord will not, without Tenant's express written consent, erect or construct or cause to be erected or constructed in or upon the driveways, alleys, sidewalks or parking areas as indicted on Exhibit "A", any buildings or structures of any nature whatsoever. Landlord shall not reduce the area of the driveways, alleys, sidewalks or parking area which are collectively indicated as "parking area" on Exhibit "A" without express written consent from Tenant.

numerous potholes.[2] The letter also noted that Decade had not cured the breach which occurred when the outlot was sold to the bank and that the sale to McDonald's was an additional breach of paragraph 12. The letter stated that if the defaults were not cured within thirty days, PDQ would declare the lease terminated and vacate the premises in accordance with the default provision of the lease.[3]

PDQ vacated the premises in December 1992. Decade commenced this action to collect sums due under the lease. Both parties moved for summary judgment. The trial court determined that no time for performance was stated in the provision requiring the landlord to maintain the parking lot, and therefore, Decade had a reasonable time to effectuate repairs after which, if there is a default, a thirty-day notice would be appropriate. It also determined that Decade's payment of real estate taxes was not a condition of the lease, and the sale of the "outlots" did not affect the parking lot and did not require PDQ's consent. It held that PDQ had no right to terminate the tenancy. The issue of Decade's mitigation of damages was tried to the court. It concluded that Decade had undertaken sufficient efforts to sublease the premises. Judgment was entered for lease payments due in the amount of $168,035.

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[2] Paragraph 3 of the lease pertained to common area maintenance expenses and real estate taxes to be charged to tenants. Paragraph 8 provided in part, "Landlord shall repair, replace and maintain common areas of the Shopping Center, including sidewalk, parking areas and driveways (including snow removal), heating and air conditioning plant and equipment as provided in paragraph 3 (b) above."

[3] Paragraph 8 of an amendment to the lease inserts the following in the default provision of the lease:

> Tenant shall give Landlord, and any mortgagee of the leased premises of which Landlord has notified Tenant, written notice of any default by Landlord in the performance of any covenant or obligation to be kept or performed hereunder, and if such default continues for a period of thirty (30) days after receipt by Landlord or said mortgagee of a written notice from Tenant specifying such default, then, and in such event, Tenant at its election may declare this Lease terminated and void and vacate the leased premises within an additional period of thirty (30) days, paying rent only to the date of said vacating.

Upon review of a summary judgment decision, we apply the standards set forth in § 802.08(2), STATS., in the same manner as the trial court. ***County of Dane v. Norman***, 174 Wis.2d 683, 686, 497 N.W.2d 714, 715 (1993). If there is no disagreement as to issues of fact, we must determine whether the moving parties were entitled to judgment as a matter of law. *See* ***id.*** This court decides question of law independently, without deference to the decision of the trial court. *See* ***id.***

We first address whether PDQ could terminate the tenancy for Decade's failure to maintain the parking lot. The lease requires Decade to maintain the parking lot. PDQ gave notice on October 28, 1992, that it believed Decade to be in default with respect to parking lot maintenance because of the existence of numerous potholes. The key provision here is the lease provision allowing termination after written notice of a default.[4]

The interpretation and construction of a contract are questions of law which we review without deference to the trial court. ***Bank of Barron v. Gieseke***, 169 Wis.2d 437, 454-55, 485 N.W.2d 426, 432 (Ct. App. 1992). The lease provides that once the landlord is given written notice of any default, "and if such default continues for a period of thirty (30) days after receipt by Landlord or said mortgagee of a written notice from Tenant specifying such default," the tenant may terminate the lease. The trial court looked solely to the provision requiring the landlord to maintain the parking lot. Finding that no time limit for a cure was established in that paragraph, the court read into the lease a reasonable time to cure a default. This was error as another provision in the lease states that the right to terminate exists when the default continues for thirty days after written notice of default. To read the lease as the trial court did would require the tenant to give two written notices of default. The necessity of two notices from the tenant is not contemplated by the lease.

There is no dispute that Decade did not make repairs to the parking lot within thirty days.[5] The remaining question is whether the

[4] See footnote 3.

[5] Decade responded to PDQ's concerns about the potholes with a November 23, 1992 letter indicating "that we have been working on getting them [the potholes] taken care of." The letter indicated that repairs were tied into the completion of the McDonald's restaurant.

existence of the potholes constituted a breach of the lease.[6] That question involves issues of fact not resolved. We reverse that portion of the judgment based on this issue and remand for further proceedings on whether the potholes in the parking lot constituted a default in the lease justifying PDQ's termination.

PDQ also contends that the lease required its approval before there could be construction of a bank and a McDonald's restaurant on the two outlots of the shopping center.[7] The lease provision on which PDQ relies required Decade to obtain written consent if the landlord caused the construction of any building "in or upon the driveways, alleys, sidewalks or parking areas" or in the event a reduction was made in the "parking area."[8]

The record establishes that the two areas sold and built on were not used as a driveway, alley, sidewalk or parking area. PDQ's consent was not necessary to build on those two outlots. However, it appears that an issue of fact exists as to whether the construction of the McDonald's restaurant caused a reduction in the parking area for which PDQ's permission was necessary. The affidavit of Michael Rooney, Milwaukee area manager for PDQ, states that the construction of the McDonald's restaurant required reconfiguration of the parking lot and, consequently, a reduction in the number of parking spaces. No affidavit countered this statement. However, in a letter from Decade's attorney to PDQ's attorney, attached to an affidavit in support of summary judgment, it was asserted that the parking lot was not reduced in size. This is sufficient to create an unresolved factual question of whether the construction reduced the parking area within the meaning of the lease.[9] We reverse the judgment on this

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[6] We reject Decade's claim that the October 28, 1992 letter of defaults was not effective notice under the lease because it came from PDQ Food Stores, Inc. and not Nash-Finch. Section 704.09(3), STATS., provides: "All covenants and provisions in a lease which are not either expressly or by necessary implication personal to the original parties are enforceable by or against the successors in interest of any party to the lease." PDQ, as a successor in interest to Nash-Finch, had the right to issue the default notice letter.

[7] PDQ concedes that Decade had the "ability to create the separate parcels."

[8] See footnote 1.

[9] It may be argued that the lease does not specifically prohibit the reduction of the number of parking spaces in contrast to a reduction in the size of the "parking area." Although the lease speaks generally about the "parking area," it differentiates that from driveways, alleys and sidewalks. Moreover, Exhibit A to the lease, incorporated by reference to the lease, shows a specific parking

ground as well. Further proceedings are necessary to determine if a reduction occurred and whether it constituted a breach of the lease because PDQ's written consent was not obtained.

We summarily address PDQ's remaining claim as to why it had the right to terminate the lease. We agree with the trial court's determination that the lease did not require Decade to make timely payment of real estate taxes. The provision requiring PDQ to pay to Decade amounts for increased taxes requires PDQ to pay its proportionate share of real estate taxes "assessed" against the shopping center which become "due and payable" during the term of the lease and to pay promptly upon receipt of a statement from the landlord but no more than thirty days before taxes are "finally due to the taxing authority." PDQ's payment is not conditioned on Decade's timely payment of taxes. While Decade was delinquent for more than two years in the payment of real estate taxes and it had collected such monies from PDQ, Decade did not breach the lease in this respect and it was not grounds for PDQ's termination.

PDQ argues that Decade failed to mitigate damages because it attempted to rent the premises at a higher rental rate than the lease rate. Section 704.29(2), STATS., reduces a landlord's recovery by "net rent obtainable by reasonable efforts to rerent the premises." "Reasonable efforts" are "those steps which the landlord would have taken to rent the premises if they had been vacated in due course, provided that such steps are in accordance with local rental practice for similar properties." ***Id.***[10] Whether the landlord acted reasonably is a finding of fact which we will not disturb unless clearly erroneous. *See* ***Ross v. Smigelski***, 42 Wis.2d 185, 198, 166 N.W.2d 243, 250 (1969).

(..continued)
space configuration. To the extent that the lease may be deemed ambiguous as to whether a reduction in the number of parking spaces is a breach, a factual question is presented which is not appropriate for summary judgment.

[10] PDQ's citation in its reply brief to ***MBC, Inc. v. Space Ctr. Minn., Inc.***, 532 N.E.2d 255, 261 (Ill. App. Ct. 1988) ("efforts to secure subleases of the warehouse at rents considerably higher than due under the sublease ... constituted a breach of [the] duty to exercise reasonable diligence to mitigate damages") and 2 M. FRIEDMAN, FRIEDMAN ON LEASES, 1011-1014 (3rd ed.) (a landlord when reletting to minimize his damages does not have the same freedom of choice that is available to him when he selects a tenant for his own account) is unpersuasive in light of Wisconsin's statutory standard for mitigation of damages.

The trial court found that Decade had undertaken substantial and reasonable efforts to relet the premises as if the premises had been vacated at the end of the lease. This finding is not clearly erroneous. Testimony indicated that negotiations were conducted with various parties and lease proposals submitted at rates generally acceptable in local rental practices. Decade advertised the property for lease and kept it listed with a broker. It is not a per se failure to mitigate when a landlord seeks a higher than lease rental rate when the landlord acts in accordance with local rental practices.

By the Court.—Judgment reversed and cause remanded.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.