COURT OF APPEALS
DECISION
DATED AND FILED

August 30, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 01-0330-FT

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

WALSH APARTMENTS, LLC,

PLAINTIFF-RESPONDENT,

V.

MAC-GRAY CO., INC.,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: GERALD W. JAECKLE, Reserve Judge. *Affirmed*.

¶1 DEININGER, J.[1] Mac-Gray Co., Inc. appeals an order which granted Walsh Apartments, LLC, a writ of restitution evicting Mac-Gray from its occupancy of the laundry rooms in Walsh's apartment complex. Mac-Gray had

---

[1] This is an expedited appeal under WIS. STAT. RULE 809.17 (1999-2000), decided by one judge pursuant to WIS. STAT. § 752.31(2)(a). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

leased the laundry rooms from the former owner of the apartments, and it claims the trial court erred in restoring the premises to Walsh because Walsh became bound on the laundry room lease when it purchased the property. We conclude the trial court did not err in ordering the eviction, and accordingly we affirm the appealed order.

BACKGROUND

¶2 In 1997, Mac-Gray entered into a twelve-year lease agreement with the former owner of the apartment complex, Parkside Apartments, LLC. The agreement provided that Mac-Gray could install pay-per-use clothes washers and dryers in the laundry rooms located throughout the apartment complex. Mac-Gray paid a one-time, upfront rent of $12,000, and it agreed to remit to Parkside fifty percent of the gross amounts collected from users of its laundry equipment.

¶3 The lease contained a provision purporting to bind "heirs, successors and assigns of the parties," which included the following language:

> Lessor also represents that in the event the Premises is sold or transferred it shall be a condition of any such sale or transfer that the prospective purchaser or transferee take an express assignment of the Lease and be bound by all of its terms and conditions. Failure of the Lessor to secure an assignment of the Lease by a prospective purchaser or transferee shall, at Lessee's option, constitute a breach of this Lease and shall not serve to relieve Lessor or the purchaser or transferee of any of the obligations under the Lease which shall continue for the remainder of the Term.

The lease agreement required Parkside, if Mac-Gray requested, to execute the lease or a notice of the lease in "recordable form," and it provided that Mac-Gray "shall record same at the appropriate registry." The lease agreement introduced at trial was not executed in recordable form, and Mac-Gray did not record the lease or a notice of it.

¶4 In March 2000, Walsh contracted to purchase the apartment complex from Parkside. The contract contained the following terms relating to leases affecting the property:

> If property is currently leased and lease(s) extend beyond closing, Seller shall assign Seller's rights under said lease(s) and transfer all security deposits and prepaid rents thereunder to Buyer at closing. The terms of the (written) (oral) [STRIKE ONE] lease(s), if any, are See Addendum A.
>
> [In Addendum A]:
>
> 2. Seller to provide the buyer within 6 weeks of acceptance of the offer the following statements, documents and materials:
>
> ….
>
> d. Current rent roll showing lease expiration dates, monthly rents and security deposits held.
>
> e. Copies of all current leases with accompanying check-in reports.
>
> ….
>
> g. Copies of all current maintenance agreements, equipment leases, (including laundry equipment leases) and on-going service contracts … etc.
>
> Buyer has three weeks from receipt of the above to review and to give written approval of these statements, documents and materials, otherwise this offer is null and void.

In a counter-offer accepted by Walsh, the three-week review and approval period specified above was amended to "10 days from receipt of statements, documents and materials to give written approval otherwise this offer is null and void."

¶5 Subsequent to the closing on Walsh's purchase of the apartment complex, Walsh notified Mac-Gray to remove its laundry equipment. Mac-Gray refused to do so, citing its lease with Parkside for the laundry rooms. Walsh then

commenced this small claims action to evict Mac-Gray from the premises. A member of the Walsh LLC testified at trial that Walsh "did not take an assignment" of the Mac-Gray lease, either "written or … oral." He acknowledged seeing the lease "shortly before the closing," but because "[w]e weren't party to the lease[,] I didn't feel it could bind us to anything." The witness was not asked whether Walsh had issued a "written approval" of the Mac-Gray lease, or of any other leases or contracts, as provided for in the contract of sale.

¶6 The trial court concluded that, at the time it entered into the purchase contract with Parkside, Walsh had neither actual or constructive notice of Mac-Gray's leasehold interest in the laundry rooms.[2] The court also concluded that Walsh's receipt of a copy of the Mac-Gray lease "[o]ne or two days before" the sale closed, did not serve to bind Walsh to its terms because Walsh had already acquired an equitable interest in the property when Parkside accepted its offer to purchase the apartment complex. Accordingly, the court ordered that Walsh be restored to possession of the areas then occupied by Mac-Gray, and the latter appeals.

ANALYSIS

¶7 The critical facts in this case are largely undisputed, and the trial court applied statutes and common law principles to those facts. This appeal

[2] The trial court found that certain notices posted by Mac-Gray in the laundry rooms did not give Walsh actual notice that Mac-Gray claimed an interest in the real estate, or even that it owned the laundry equipment. The notices apparently directed only that Mac-Gray be called if any laundry equipment was in need of service or repair. Copies of the notices were introduced at trial (as Exhibits 7 and 8), but they are not included in the record on appeal. Accordingly, we must assume that the exhibits support the trial court's findings. *See* ***State v. Smith***, 55 Wis. 2d 451, 459, 198 N.W.2d 588 (1972) (noting that an appellant "has the duty to see that the evidence material to the appeal is in the record").

therefore presents questions of law which we review de novo. ***First Nat'l Leasing Corp. v. Madison***, 81 Wis. 2d 205, 208, 260 N.W.2d 251 (1977).

¶8 There are three possible sources of an obligation on Walsh's part to honor the Parkside/Mac-Gray lease: the lease itself, the real estate purchase contract between Walsh and Parkside, or requirements established by statute or common law. We conclude that none of these provides support for Mac-Gray's claim that Walsh was bound to the terms of its laundry room lease.

¶9 We first consider the terms of the Parkside/Mac-Gray lease. Walsh was neither a party to the lease, nor did it agree to be bound by it, and Parkside did not specifically assign the lease to Walsh at the time of the real estate sale. The provisions in the lease which purport to bind Walsh as a successor to Parkside therefore have no effect absent some transaction or agreement between Parkside and Walsh regarding the lease, or unless a statute or common law obligates Walsh on the present facts. Mac-Gray may have a claim or claims against Parkside for a breach of Parkside's obligations under the lease relating to a sale of the property, but those claims, even if established, would not confer on Mac-Gray a right to continued occupancy of the laundry rooms following the sale to Walsh.

¶10 We next consider, therefore, whether any provisions in the Parkside/Walsh contract served to bind Walsh to the Mac-Gray lease. It appears that the parties to the sale intended that all apartment leases were to continue under the new owners, inasmuch as prepaid rents and security deposits were to be prorated and settled at closing between the buyer and seller. The contract also provided that if, after Walsh received and reviewed the leases and other documents (such as equipment leases and service contracts), Walsh did not approve of them in writing, the real estate contract was to be "null and void." The

record is silent as to whether Walsh issued a written approval of the items set forth in the contract addendum, but since the transaction successfully closed, we can only assume the requirement was met or waived.

¶11 The testimony of Walsh's witness that Parkside made no specific assignment of the Mac-Gray lease is unrefuted, and there is no indication in the record that any portion of Mac-Gray's initial $12,000 rental payment was transferred from Parkside to Walsh. Although the Walsh representative was given a copy of the Mac-Gray lease shortly before the closing on the sale, nothing in the record indicates that Parkside took any steps to assign its rights and obligations under the lease to Walsh, or that Walsh did or said anything that might be construed as an assumption of the lessor's obligations under the lease.

¶12 Accordingly, if Mac-Gray is to prevail, it can only be because a statute or case law requires Walsh to be bound on the lease under the facts of this case. Mac-Gray argues that just such a requirement can be found in WIS. STAT. § 706.09, which provides in relevant part as follows:[3]

> **(1)** WHEN CONVEYANCE IS FREE OF PRIOR ADVERSE CLAIM. A purchaser for a valuable consideration, without notice as defined in sub. (2), and the purchaser's successors in interest, shall take and hold the estate or interest purported to be conveyed to such purchaser free of any claim adverse to or inconsistent with such estate or interest, if such adverse claim is dependent for its validity or priority upon:
>
> ….
>
> (b) *Conveyance outside chain of title not identified by definite reference.* Any conveyance, transaction or event not appearing of record in the chain of title to the real

[3] The parties do not dispute that the Parkside/Mac-Gray lease was a "conveyance" within the meaning of WIS. STAT. ch. 706. *See* § 706.01(4).

> estate affected, unless such conveyance, transaction or event is identified by definite reference in an instrument of record in such chain….
>
> ….
>
> **(2)** NOTICE OF PRIOR CLAIM. A purchaser has notice of a prior outstanding claim or interest, within the meaning of this section wherever, at the time such purchaser's interest arises in law or equity:
>
> (a) *Affirmative notice*. Such purchaser has affirmative notice apart from the record of the existence of such prior outstanding claim, including notice, actual or constructive, arising from use or occupancy of the real estate by any person at the time such purchaser's interest therein arises, whether or not such use or occupancy is exclusive; but no constructive notice shall be deemed to arise from use or occupancy unless due and diligent inquiry of persons using or occupying such real estate would, under the circumstances, reasonably have disclosed such prior outstanding interest; nor unless such use or occupancy is actual, visible, open and notorious; or
>
> (b) *Notice of record within 30 years*. There appears of record in the chain of title of the real estate affected, within 30 years and prior to the time at which the interest of such purchaser arises in law or equity, an instrument affording affirmative and express notice of such prior outstanding interest conforming to the requirements of definiteness of sub. (1)(b) ….

¶13 It is undisputed that Mac-Gray did not provide "notice of record" of its leasehold interest in the laundry rooms. According to Mac-Gray, however, it makes no difference that it did not record its lease because Walsh's receipt of a copy of the lease shortly before closing constitutes "affirmative notice" within the meaning of the statute. Thus, Walsh could not take legal title at closing "free and clear" of Mac-Gray's leasehold interest. In Mac-Gray's view, if Walsh did not like the terms of the laundry room lease, it should have objected and walked away from the purchase, as it was permitted to do under the purchase contract. In short, Mac-Gray argues that the trial court erred in concluding that the failure of notice, actual or constructive, prior to the time Walsh contracted to purchase the property,

allowed Walsh to take the property clear of Mac-Gray's claim under its lease. Mac-Gray insists that the acquisition of legal title at closing is the critical event, and because Walsh had received actual notice by that time, it became bound on the lease.

¶14 Unfortunately, Mac-Gray offers no authority to support its assertion that actual notice before closing trumps the lack of notice prior to entering into the purchase contract. Mac-Gray cites only one case in this portion of its argument, ***Grosskopf Oil, Inc. v. Winter***, 156 Wis. 2d 575, 584, 457 N.W.2d 514 (Ct. App. 1990), which it claims stands for the proposition that a purchaser can be "charged with notice of a tenant's possession under a prior unrecorded lease." ***Grosskopf*** was a legal malpractice case and our principal conclusion was that WIS. STAT. § 706.11, which deals with priorities among mortgage and lien holders, "does not apply to leases." ***Id.*** at 582. We then went on to note that WIS. STAT. § 706.08 might give a mortgage holder priority over an unrecorded lease, but only if the mortgagee "had no knowledge of the prior lease." ***Id.*** at 584. We explained that the existence of actual or constructive notice is an issue of fact, which required us to remand to the trial court for determination. ***Id.*** at 585-86.

¶15 Here, consistent with ***Grosskopf***, the trial court found that the "call for service" notices in the laundry rooms did not provide Walsh actual or constructive notice of Mac-Gray's leasehold interest prior to the real estate purchase, and Mac-Gray does not challenge that finding on appeal. The ***Grosskopf*** opinion provides no guidance regarding the determinative legal issue in this case: whether knowledge of an unrecorded lease, acquired after entering into a purchase contract but prior to closing, constitutes "affirmative notice" of the lease "at the time … [the] purchaser's interest ar[ose] in law or equity." WIS. STAT. § 706.09(2).

¶16 Walsh asserts in response that the phrase "at the time such purchaser's interest arises in law *or* equity" in § 706.09(2) (emphasis added), evinces the legislature's intent that "affirmative notice" must occur prior to the time that a contract for the purchase and sale of real estate becomes final and binding on the parties. It is undisputed that Walsh and Parkside entered into a contract for the transfer of ownership of the apartment complex before Walsh received a copy of the Mac-Gray lease. According to Walsh, the trial court was thus correct in concluding that it had no affirmative notice of the lease until after its equitable interest in the real estate arose, and that Walsh was therefore not obligated to honor the lease. In support, Walsh cites a legal treatise on Wisconsin real estate law indicating that the common law of this state embraces the concept of "equitable conversion," that is, that a buyer of property becomes its equitable owner as of the time the contract is made, even though payment of the purchase price, conveyance of legal title, and other formalities occur at a later "closing."[4]

¶17 We agree with Walsh that ***Mueller v. Novelty Dye Works***, 273 Wis. 501, 78 N.W.2d 881 (1956), also provides support for its position and the trial court's ruling. The supreme court explained in ***Mueller*** that:

> 'the vendee becomes equitable owner of the land, and the vendor equitable owner of purchase-money, at once, upon the execution and delivery of the contract, even before any portion of the price is paid….'
>
> In equity, then, the vendee, at the time the agreement is entered into, becomes the owner of the land; his equitable interest is in the property….

[4] See WALTER B. RAUSHENBUSH & SCOTT C. MINTER, WISCONSIN REAL ESTATE LAW § 5.01(D) at 5-4 (1994).

Id. at 504-05 (citation omitted). Thus, once Parkside and Walsh entered into the sale contract, Parkside had "only a security title to the real estate equivalent to a mortgagee's interest," which secured Walsh's promised payment of the purchase price, ***id.*** at 507, and when Walsh first obtained affirmative notice of the Mac-Gray lease, it had already acquired equitable ownership of the apartments.

¶18 Mac-Gray argues, however, that the purchase and sale contract was *not* binding on execution because of the provision allowing Walsh to review existing leases and contracts and to either approve them or to nullify the agreement. We reject this argument because, once the contract was entered into, Parkside was irrevocably bound to convey the property to Walsh. The fact that the contract granted Walsh a unilateral option to cancel the sale did not negate Walsh's equitable interest in the apartments, which arose upon execution of the contract. Unlike the tenants of apartments in the complex, whose physical occupancy provided affirmative notice of their leasehold interests at the time the contract for sale of the complex was entered into, the trial court found that Walsh did not acquire notice of Mac-Gray's interest until after it became the equitable owner of the property.

¶19 Mac-Gray also argues that WIS. STAT. § 704.09(3) binds "successors in interest" of the parties to a lease, even if the lease is not "specifically assigned" to a subsequent owner of the property.[5] Walsh asserts that Mac-Gray did not

[5] WISCONSIN STAT. § 704.09(3) provides as follows:

(continued)

make this argument in the trial court and thus may not make it in this court. Mac-Gray does not dispute in its reply brief that it first raises the applicability of § 704.09 on appeal. Accordingly, we deem the issue forfeited and do not address it. *See* ***State v. Rogers***, 196 Wis. 2d 817, 827, 539 N.W.2d 897 (Ct. App. 1995) ("We will not ... blindside trial courts with reversals based on theories which did not originate in their forum.").

¶20 Finally, we note in closing that the present result is not as harsh as it may first appear. Given the provision in the Parkside/Mac-Gray lease calling for its execution in recordable form, and the provision that Mac-Gray "shall record" the lease, Mac-Gray was clearly aware of the steps necessary for it to ensure that any purchasers of the property would be obligated to honor its lease.[6] It did not take those steps, nor did it post notices of its possessory interest in the laundry rooms. At the time it contracted to purchase the apartments, Walsh was thus "without notice" of Mac-Gray's interest, and under WIS. STAT. § 706.09, it was entitled to take the property free of Mac-Gray's claim to continued occupancy rights. The forfeiture of Mac-Gray's right to continued occupancy of the laundry

---

> COVENANTS WHICH APPLY TO TRANSFEREE. 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. However, a successor in interest is liable in damages, or entitled to recover damages, only for a breach which occurs during the period when the successor holds his or her interest, unless the successor has by contract assumed greater liability; a personal representative may also recover damages for a breach for which the personal representative's decedent could have recovered.

[6] The lease is a preprinted form which appears to have been prepared and furnished by Mac-Gray.

rooms resulted from its own omissions (or those of the former owner, Parkside), not from any improper actions on Walsh's part.

CONCLUSION

¶21 For the reasons discussed above, we affirm the appealed order. Because we do so, it is not necessary for us to address Mac-Gray's claim for attorney fees under the lease.

By the Court.—Order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)4.