

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 13, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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

**Appeal No. 01-1310
STATE OF WISCONSIN**

Cir. Ct. Nos. 98-CV-173, 98-SC-865

**IN COURT OF APPEALS
DISTRICT III**

**JAMES COWDEN AND STEVEN EVERT, D/B/A NORTHERN
HEALTH SERVICES AND NORTHERN BEHAVIORAL HEALTH
SYSTEMS, INC.,**

PLAINTIFFS-RESPONDENTS,

V.

DAVID KADLEC AND GAYLE KADLEC,

DEFENDANTS-APPELLANTS.

DAVID KADLEC AND GAYLE KADLEC,

PLAINTIFFS-APPELLANTS,

V.

JAMES COWDEN AND STEVEN EVERT,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Chippewa County:
THOMAS J. SAZAMA, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. David and Gayle Kadlec appeal a judgment awarding Northern Health Services (NHS)¹ \$154,160.08 in damages for breach of a lease agreement for a Community Based Residential Facility (CBRF).² The circuit court concluded that, based on Section Two of the lease agreement, the lease term commenced on January 27, 1998. The Kadlecs argue that based on Section Two of the lease agreement, the lease commenced on November 12, 1997. In the alternative, the Kadlecs contend that the lease commenced on November 21, 1997. We conclude that Section Two is ambiguous and that under the most reasonable construction, the lease term did not commence because NHS never occupied the CBRF. Therefore, we affirm the judgment.

BACKGROUND

¶2 On April 28, 1997, the Kadlecs and NHS executed a lease agreement.³ Under the lease agreement, the Kadlecs would construct a CBRF and NHS would operate it.

¹ James Cowden and Steven Evert were the owners of NHS. NHS was later incorporated as Northern Behavioral Health Systems, Inc.

² A CBRF is “a place where 5 or more unrelated adults reside in which care, treatment or services above the level of room and board but not including nursing care are provided to persons residing in the facility as a primary function of the facility.” *Juneau County v. Sauk County*, 217 Wis. 2d 705, 711-12, 580 N.W.2d 694 (Ct. App. 1998) (citation omitted).

³ The lease agreement was drafted by the Kadlecs.

¶3 Section Two of the lease agreement states that the “term of the lease begins when the premises have been completed in accordance with the plans and specifications agreed upon by the parties and/or the Lessee begins to move in their furnishings.” Section Two also states that if the Lessee is permitted to occupy the premises on the first day of the month, “Lessee shall pay monthly rent no later than the fifth day of the month if permitted to occupy the premises on the first day of the month. If occupancy occurs on a day after the fifth of a month, the first rent payment shall be due on or before the fifth day of the month following occupancy.”

¶4 Construction of the CBRF began in June of 1997 and continued through the summer. On October 31, 1997, Chippewa Falls’ building inspector notified the Kadlecs that there were certain deficiencies that needed correction by November 15 before a certificate of occupancy could be authorized. On November 12, the Kadlecs’ architect issued a new building “compliance statement” pursuant to WIS. ADMIN. CODE § COMM 50.10(3).⁴

¶5 As a result of the architect’s statement, the Kadlecs believed that the CBRF had been completed by November 5 and mailed a thirty-day notice to quit

⁴ WISCONSIN ADMIN. CODE § COMM 50.10(3) reads as follows:

(3) COMPLIANCE STATEMENT. Prior to initial occupancy of a new building or addition, and prior to final occupancy of an alteration of an existing building, the supervising architect, engineer or designer shall file a written statement with the authority that issued plan approval certifying that, to the best of his or her knowledge and belief, construction of the portion to be occupied has been performed in substantial compliance with the approved plans and specifications. This statement shall be on a form prescribed by the department.

or pay rent to NHS on November 17.⁵ The notice provided for the termination of NHS's tenancy as of December 19, unless NHS paid the rent that was claimed to have been due on November 5.

¶6 On November 21, 1997, Chippewa Falls' building inspector issued a certificate of occupancy letter. The inspector stated that the "building had been substantially completed in accordance to the plans and specifications as submitted."

¶7 On November 24, Leo Schlimgen, an engineer employed by the State Department of Health and Family Services, Division of Supportive Living, sent a letter to the Kadlecs advising them that he intended to inspect the CBRF on December 8. The inspection was arranged by NHS.⁶ After his inspection, Schlimgen indicated that the building was not in compliance with the requirements of NFPA 72⁷ and that an additional inspection would be required before he would allow the building to be licensed as a CBRF.

⁵ Section Fifteen of the lease agreement states in relevant part:

A. Acts of Default of Lessee. Each of the following shall be deemed a breach of this lease:

1. Failure to pay rent due hereunder for a period of thirty (30) days after written notice.

⁶ Section Seven of the lease agreement reads as follows: "Lessee intends to use leased premises as a state licensed Community Based Residential Facility. Lessee shall be responsible for the completion of all procedures and applications required to obtain the necessary licenses and permits to operate the facility as a CBRF."

⁷ NFPA 72, established by the National Fire Protection Association, contains the minimum requirements for the inspection, testing and maintenance of existing water-based fire protection systems.

¶8 On December 31, the Kadlecs had the locks on the CBRF changed. NHS objected and sent the Kadlecs a letter stating that it was not obligated to pay rent until it had received notice that an occupancy permit had been issued for the premises. NHS was relying upon Schlimgen's statements that he would not license the building to operate as a CBRF until the building was in compliance with NFPA 72. The letter also expressed NHS's intention to occupy the CBRF as soon as Schlimgen approved the building. However, on January 15, the Kadlecs informed NHS that its tenancy had been terminated due to nonpayment of rent.

¶9 On January 27, 1998, Schlimgen re-inspected the building and found it to be in substantial compliance with NFPA 72 and permitted the building to be licensed as a CBRF. NHS informed the Kadlecs that it was ready to occupy the CBRF on February 1. Instead, the Kadlecs entered into a new lease with Jerry and Elaine Felker to operate the CBRF.

¶10 On June 24, the Kadlecs commenced an action to recover lost rent. The Kadlecs argued that NHS's obligation to pay rent began when the Kadlecs' architect issued the new building compliance statement on November 12. NHS filed a separate action seeking damages for the Kadlecs' breach of the lease contract. NHS argued that obtaining DHFS approval for licensure was a condition precedent to its obligation to pay rent. Therefore, it claimed no rent was due until February 5, 1998. The two actions were consolidated.

¶11 The matter was tried to the circuit court. The court agreed with NHS and concluded that based on Section Two of the lease agreement:

The subject building was not "suitable for use," or as Mr. Schlimgen put it, "OK to license" as a CBRF until January 27, 1998, when Schlimgen completed his inspection process and issued the "OK to license." Until that time, the building could not have been used as a CBRF

because the construction of the premises had not been approved.

The court awarded NHS \$154,160.08 in damages.

DISCUSSION

¶12 The Kadlecs argue that the circuit court erred by holding that the lease commenced when the CBRF was certified on January 27, 1998. The Kadlecs contend that the lease commenced on November 12, 1997, because that is when the Kadlecs' architect issued a new building compliance statement.⁸ They contend that the architect's new building compliance statement is the equivalent of the language found in Section Two of the lease agreement, which states that the lease term "begins when the premises have been completed in accordance with the plans and specifications" In the alternative, the Kadlecs contend that the lease commenced on November 21, 1997, when the building inspector signed a certificate of occupancy letter.⁹

¶13 Whether a contract is ambiguous presents a question of law, which we decide independently of the circuit court. *Wausau Underwriters Ins. Co. v. Dane County*, 142 Wis. 2d 315, 322, 417 N.W.2d 914 (Ct. App. 1987). A contract is ambiguous if its terms are susceptible to more than one reasonable

⁸ The Kadlecs no longer contend that the lease commenced prior to November 5, 1997.

⁹ The Kadlecs also argue that the circuit court erred by failing to apply the doctrine of issue preclusion. The Kadlecs contend that a decision by the Vilas County Circuit Court precluded the court in this case from ruling in favor of NHS. However, our decision is consistent with the Vilas County case. In that case, involving a lease agreement identical to the one at issue here, NHS argued that obtaining a license to operate the CBRF was a condition precedent to its obligation to pay rent. The court disagreed and concluded that NHS's obligation to pay rent had commenced because NHS has already moved personal property into the building, thus triggering the obligation to pay rent.

interpretation. *Wilke v. First Fed. S&L Ass'n*, 108 Wis. 2d 650, 654, 323 N.W.2d 179 (Ct. App. 1982).

¶14 Contracts are construed to achieve the parties' intent. *Eden Stone Co. v. Oakfield Stone Co.*, 166 Wis. 2d 105, 116, 479 N.W.2d 557 (Ct. App. 1991). The terms used in a contract are to be given their plain or ordinary meaning. *In re All-Star Ins. Corp.*, 112 Wis. 2d 329, 333, 332 N.W.2d 828 (Ct. App. 1983). "Thus, a clear contractual provision must be construed as it stands. Ambiguities, however, may be construed against the party who drafted the contract" *United States Fire Ins. Co. v. Ace Baking Co.*, 164 Wis. 2d 499, 502-03, 476 N.W.2d 280 (Ct. App. 1991).

¶15 The circuit court determined that NHS could not occupy the CBRF under the terms of the lease until after it was certified on January 27, 1998. As a result, the court held that the Kadlecs breached the lease agreement. We agree with the court's holding that the Kadlecs breached the lease agreement, but for a different reason.

¶16 When contractual terms are reasonably susceptible to more than one construction, the contract is ambiguous. *Gorton v. Hostak, Henzl & Bichler*, 217 Wis. 2d 493, 506, 577 N.W.2d 617 (1998). Section Two of the lease agreement provides that "the term of the lease begins when the premises have been completed in accordance with the plans and specifications agreed upon by the parties and/or the Lessee begins to move in their furnishings" The very nature of "and/or" is ambiguous because it renders the contract susceptible to three interpretations. *Goldstein v. Lindner*, 2002 WI App 122, ¶13.

¶17 We construe the ambiguities against the Kadlecs because they drafted the lease agreement. In this context, the usual interpretation of "and/or" is

inapplicable because each word cancels out the other. If the parties meant that the lease term begins when the premises are completed “or” the lessee moves in, the “and” is superfluous. If the parties meant the lease term begins when the premises are completed “and” the lessee moves in, then the “or” is superfluous. Finally, if the parties meant both, the “or” is rendered superfluous. Therefore, we conclude that the most reasonable construction, giving meaning to both the “and” and the “or” is that the lessee’s rent obligation begins when both the premises are completed “and” the lessee begins to move in, or, even if the premises have not been fully completed, when the lessee nevertheless begins to move in.

¶18 Under this interpretation, the only indisputable event that could have triggered NHS’s obligation to pay rent was if it began to move its personal property into the CBRF. However, NHS never moved in any personal property. In fact, it was prevented from doing so when the Kadlecs changed the locks. Therefore, the lease could not have commenced on November 12, 1997, November 21, 1997, or on January 27, 1998, because NHS never “move[d] in their furnishings” as required by Section Two of the lease agreement. As a result, the trial court correctly found that the lease had not commenced when the Kadlecs attempted to terminate it.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

