COURT OF APPEALS DECISION DATED AND FILED

October 14, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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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. 03-0129

Cir. Ct. Nos. 01CV009734
01CV009735

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

KI YONG PARK, D/B/A NEW KIDS, AND DOO HEE LEE,

PLAINTIFFS-APPELLANTS,

V.

BOULDER VENTURE 9, L.L.C., AND CAPITOL COURT CORPORATION,

DEFENDANTS-RESPONDENTS.

DOO HEE LEE, D/B/A U.S. HAIRCARE,

PLAINTIFF-APPELLANT,

V.

BOULDER VENTURE 9, L.L.C., AND CAPITOL COURT CORPORATION,

DEFENDANTS-RESPONDENTS.

APPEAL from an order and a judgment of the circuit court for Milwaukee County: MAXINE A. WHITE, Judge. *Reversed and cause remanded with directions*.

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Doo Hee Lee, d/b/a U.S. Haircare, and Ki Yong Park, d/b/a New Kids, appeal from the trial court's grant of summary judgment in favor of Boulder Venture 9, L.L.C., and Capitol Court Corporation, and denial of Park's and Lee's motion for reconsideration. Lee and Park also appeal from a judgment granting Boulder Venture's and Capitol Court Corporation's motion for attorneys fees and costs.

¶2 Lee and Park sued Boulder Venture and Capitol Court Corporation after Boulder Venture terminated their commercial leases at the Capitol Court Shopping Center. Lee and Park claim that the trial court erred when it granted summary judgment because material facts are in dispute as to whether Boulder Venture: (1) breached the covenant of quiet enjoyment; (2) constructively evicted them; and (3) breached the covenant of good faith. We reverse and remand to the trial court for a trial on these issues. Lee and Park also allege that: (1) the trial court used the wrong legal standard when it denied their motion for reconsideration; and (2) the trial court erred when it awarded Boulder Venture and Capitol Court Corporation $49,765.81 in attorneys fees and costs. Our reversal of the summary judgment motion renders these issues moot for the purposes of this appeal.

I.

¶3 Doo Hee Lee and Ki Yong Park leased space in the Shopping Center from Capitol Court Corporation.[1] The leases ran from March 25, 1991, to January of 2002, and February 15, 1994, to January of 2005, respectively. The leases also contained identical covenants of quiet enjoyment, which provided:

> **Quiet Enjoyment.** Landlord covenants and agrees that Tenant, subject to the terms and provisions of this Lease, on payment of the rent and observing, keeping and performing all of Tenant's covenants, shall lawfully, peaceably and quietly have, hold, occupy and enjoy the Leased Premises and any appurtenant rights granted to Tenant under this Lease during the Lease Term without hindrance or ejection by Landlord or any persons lawfully claiming under Landlord, subject to the other terms and conditions of this Lease, to all mortgages, underlying leases and other matters of record to which this Lease is or may become subject and subordinate, as the same may now or hereafter be amended from time to time.

¶4 In August of 1999, Boulder Venture began negotiations with Capitol Court Corporation to purchase the Shopping Center. On September 27, 2000, Boulder Venture sent a letter to Lee and Park notifying them that it intended to terminate all leases:

> As I am sure you are aware, Boulder Venture is proceeding with all acquisition and redevelopment plans for Capitol Court Shopping Center. We are planning on closing the mall after the holiday season and officially terminating all Leases by January 31, 2001.
>
> To compensate for the existing term on your leases at US Hair Care and New Kids, you have requested $195,500 and $173,087, respectively, for lost revenue and relocation expenses. Although we cannot afford to pay you this

[1] Lee was Park's brother-in-law and signed Park's lease. Lee operated U.S. Haircare, a beauty-supply shop, and Park operated New Kids, a children's clothing store.

> amount, we are willing to negotiate a preferred location for your business in our new center.

¶5 Boulder Venture assumed management of the Shopping Center on February 1, 2001. Upon assuming management, Boulder Venture cut services and removed asbestos from portions of the Shopping Center. Lee moved out in mid-March, and Park moved out at the end of March. Although there were oral negotiations, neither Lee nor Park had a written agreement with Boulder Venture for the termination of their leases when they moved out.

¶6 Lee and Park did not pay April rent. On April 3, 2001, Boulder Venture sent a letter to Lee and Park informing them that they had defaulted on their leases when they failed to pay April rent: "please consider this written notice that you are hereby in default pursuant to Section 10.1 of your Lease. As stated in the aforementioned Section, you have fourteen (14) days to cure such default." When Boulder Venture did not receive rent from Lee or Park within fourteen days, it terminated the leases.

¶7 In practically identical complaints, Lee and Park sued Boulder Venture and Capitol Court Corporation for breach of contract, breach of the duty of good faith, constructive eviction, and unjust enrichment. The trial court consolidated the cases for discovery and trial.

¶8 Boulder Venture and Capitol Court Corporation moved for summary judgment. They contended that the claims were precluded as a matter of law because Lee and Park were properly evicted when they defaulted on the leases. They further alleged, among other things, that the constructive-eviction and the breach-of-good-faith claims could be resolved on summary judgment because there were no disputed issues of material fact.

¶9 Lee and Park asserted that summary judgment was inappropriate because issues of fact existed as to whether Boulder Venture constructively evicted them and breached its duty of good faith.

¶10 As noted, the trial court granted the motion for summary judgment. It dismissed the claims because it opined that the case "was a straightforward commercial eviction": "there was a commercial lease, … the rent was not paid, … a notice of default was issued, … a time for cure was given and no cure was made within the period." It also concluded that there was no merit to the constructive-eviction and breach-of-good-faith claims:

> I do not find any detail of any facts in dispute that are material that would support anything close to a constructive eviction. The facts in the record suggest to the contrary that people were able to continue to do business in the Mall and that occupancy continued up to late May of 2001.
>
> I also have not heard or been directed to any facts in the record to support any claim of bad faith.

II.

¶11 Our review of the trial court's grant of summary judgment is *de novo*, and we use the same method as did the trial court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315–317, 401 N.W.2d 816, 820–821 (1987).

> Under that methodology, the court first examines the pleadings to determine whether claims have been stated and a material issue presented. If the complaint states a claim and the pleadings show the existence of factual issues, the court examines the moving party's affidavits or other evidence for evidentiary facts admissible in evidence or other proof to determine whether that party has made a *prima facie* case for summary judgment. If the moving party made a *prima facie* case, the court examines the opposing party's affidavits for evidentiary facts or other proof to determine whether a genuine issue exists as to any material fact, or reasonable conflicting inferences may be

> drawn from the undisputed facts, and therefore a trial is necessary.

State Bank of La Crosse v. Elsen, 128 Wis. 2d 508, 511, 383 N.W.2d 916, 917 (Ct. App. 1986).

A. *Quiet Enjoyment/Constructive Eviction*

¶12 We first consider whether summary judgment was appropriate with regard to the claims that Boulder Venture breached the covenant of quiet enjoyment and constructively evicted Lee and Park from the Shopping Center. We review these claims together because the elements are interrelated. *See* ***First Wis. Trust Co. v. L. Wiemann Co.***, 93 Wis. 2d 258, 267, 286 N.W.2d 360, 364 (1980) ("A constructive eviction constitutes a breach of the covenant for quiet enjoyment."). We also review, by implication, the breach-of-contract claim.[2] In the complaints, Lee and Park cast the breach-of-contract claim as a claim for the breach of the covenant of quiet enjoyment: "[T]he defendant, Capitol, expressly agreed to deliver to plaintiffs the quiet enjoyment of the use of the premises for each lease.… The defendants' conduct amounts to a breach of the lease." They also admitted at the hearing on the summary-judgment motion that the claims were related: "The same facts that suggest breach of contract on the part of the defendants also show that there is a constructive eviction."

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[2] Lee and Park also claim that Boulder Venture breached the leases because it repudiated the leases when it notified them on September 27, 2000, that it was terminating all leases. This claim was raised for the first time on their motion for reconsideration. In light of our not needing to address whether the trial court erroneously exercised its discretion in refusing to consider the plaintiffs' motion for reconsideration, we also do not address this issue. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed); *cf.* ***Rothwell Cotton Co. v. Rosenthal & Co.***, 827 F.2d 246, 251 (7th Cir. 1987) ("[A] motion for reconsideration [should not] serve as the occasion to tender new legal theories for the first time.") (quoted source omitted).

¶13 We begin by reviewing Lee's and Park's complaints. When considering the sufficiency of the complaint on summary judgment, we apply the same principles that govern a motion to dismiss for the failure to state a claim: "we will grant the motion only if, taking the pleaded facts as true and construing the allegations liberally, giving the plaintiff the benefit of all inferences, it is quite clear that under no conditions can the plaintiff prevail." ***Magnum Radio, Inc. v. Brieske***, 217 Wis. 2d 130, 136, 577 N.W.2d 377, 379 (Ct. App. 1998) (quoted source and internal quotation marks omitted).

¶14 To show constructive eviction, a tenant must prove that the premises were "unfit for … the purposes for which they are leased." ***First Wis. Trust Co.***, 93 Wis. 2d at 267–268, 286 N.W.2d at 365. The complaints alleged that Lee and Park were constructively evicted from the Shopping Center when Boulder Venture "rendered the leased premises unfit for occupancy for the purposes for which it was demised and deprived the plaintiff of the beneficial enjoyment of the premises" by: reducing store hours; reducing services; and fencing off the Shopping Center.

¶15 The complaints allege conduct that, if proven true, could be found to show that the Shopping Center was unfit for use by its store-tenants. *See* ***Bermuda Ave. Shopping Ctr. Assocs. v. Rappaport***, 565 So. 2d 805, 807 (Fla. Dist. Ct. App. 1990) (construction which made store appear to be closed, elimination of parking spaces, and evidence of dust, dirt, and debris supported determination that store was unsuitable for occupancy). We now turn to the issue of whether there are disputed issues of material fact sufficient to warrant a trial.

¶16 At the hearing on the motion for summary judgment, Boulder Venture and Capitol Court Corporation argued that the constructive-eviction

claim: (1) was a pretext because the allegedly undisputed facts showed that Lee and Park "had decided in the Fall of 2000 that they were going to leave the Mall"; and (2) could be dismissed because the allegedly undisputed facts showed that ten to fifteen tenants were able to conduct business in the Shopping Center during the time that Lee and Park claimed it was unfit to operate as a shopping mall.

¶17 To support their first claim, Boulder Venture and Capitol Court Corporation submitted Lee's deposition testimony. Lee testified that he began to look for a new space in December of 2000 and signed a new lease on January 25, 2001. They also submitted Park's deposition testimony. Park testified that he signed a new lease at the end of March of 2001.

¶18 To support their argument that the Shopping Center was fit for use as a shopping mall, Boulder Venture and Capitol Court Corporation submitted Lee's testimony that seven tenants remained at the Shopping Center after he left. They also submitted the deposition testimony of Robert E. Schmidt, III, an owner of Boulder Venture, and Maureen Carney, an employee of Boulder Venture. Schmidt testified that between the end of January and early February of 2001 there were ten to fifteen tenants in the Shopping Center. Carney testified that there were two tenants in the Shopping Center in late May of 2001.

¶19 To show that they were not able to operate a store in the Shopping Center, Lee and Park submitted Lee's deposition testimony. Lee claimed that it became "impossible to operate a business" in the Shopping Center because, from February to mid-March, Boulder Venture: reduced shopping hours, closed the public bathrooms, closed some of the entrances to the Shopping Center, discontinued garbage service, detoured public transportation, erected a fence around the Shopping Center, decreased security, closed the customer service desk,

dimmed the lights, removed benches and chairs from the common areas, stopped mail collection, and began to demolish part of the Shopping Center. Lee and Park also submitted six photographs of the Shopping Center depicting, among other things: an empty customer-service counter, blocked-off portions of the Shopping Center, and a closed snack area.

¶20 Additionally, Lee and Park submitted Schmidt's deposition testimony. Schmidt testified that Boulder Venture reduced the Shopping Center's hours on February 1, 2001, and that there "were proportionate cut-backs in services." According to Schmidt, asbestos was removed from the Shopping Center in February of 2001 and the demolition of the Shopping Center was complete by the end of 2001.

¶21 Finally, Lee and Park submitted a "Notice," dated February 20, 2001, informing all Shopping Center tenants: "As required by OSHA regulations 29 CRF 1926.1101(k), we are hereby notifying you that Boulder Venture is mobilizing for asbestos abatement work in selected areas of the Capitol Court Shopping Mall this week." A reasonable fact-finder could determine that this evidence, if proven true, shows that the Shopping Center was no longer fit for use by the stores as a place to do business. There were thus genuine issues of material fact for trial.

¶22 Boulder Venture's claim that Lee and Park raised the fitness-for-business issue as a pretext because they had signed leases elsewhere is disingenuous. A reasonable fact-finder could determine that Lee and Park signed new leases outside the Shopping Center because Boulder Venture informed them that it was going to terminate their leases and demolish the Shopping Center. Once Boulder Venture informed Lee and Park that it was going to terminate their

leases, they had a duty to mitigate their damages by looking for new space. ***See Ross v. Smigelski***, 42 Wis. 2d 185, 196, 166 N.W.2d 243, 249 (1969) ("In any case of a breach of contract the party injured should use reasonable diligence and make all reasonable effort to reduce to a minimum the damages resulting from such breach…. Under this rule, when the plaintiff was informed that the defendant could not give him possession of the store as he had covenanted to do … it became his duty to use all reasonable efforts to procure another suitable place in which to carry on his business.") (quoted source omitted, second ellipsis in original).

B. *Breach of the Duty of Good Faith*

¶23 Next, we consider whether summary judgment was appropriate with regard to the claim that Boulder Venture breached its duty of good faith.[3] The duty of good faith and fair dealing is an implied condition of every contract, ***Hauer v. Union State Bank of Wautoma***, 192 Wis. 2d 576, 598, 532 N.W.2d 456, 464 (Ct. App. 1995), and "is intended as a guarantee against 'arbitrary or unreasonable conduct' by a party," ***Foseid v. State Bank of Cross Plains***, 197 Wis. 2d 772, 796, 541 N.W.2d 203, 213 (Ct. App. 1995) (quoted source omitted). Breaches of the covenant of good faith include: "evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of power to specify terms, and interference with or failure to cooperate in the other party's performance." ***Id.***, 197 Wis. 2d at 797, 541 N.W.2d at 213 (quoted source omitted).

[3] Lee and Park do not raise the unjust-enrichment claim on appeal. Accordingly, we do not discuss it. ***Reiman Assocs., Inc. v. R/A Adver., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292, 294 n.1 (Ct. App. 1981) (contentions not briefed are waived).

¶24 Lee's and Park's complaints alleged that on September 27, 2000, Boulder Venture informed them that the Shopping Center would be demolished and that all leases would be terminated. As noted, the complaints also alleged that Boulder Venture's conduct subsequently rendered the Shopping Center unfit for Lee's and Park's continued operation of their businesses in the Shopping Center. Thus, Lee and Park alleged that the defendants breached the duty of good faith "by claiming a technical default on the part of the plaintiffs during negotiations directed at determining the amount of compensation to be paid … for leaving the store."

¶25 The complaints allege facts that, if true, could be found to show that Boulder Venture's conduct was unreasonable. A reasonable fact-finder could infer that Boulder Venture made the conditions for Lee and Park so intolerable that they would vacate the premises and then Boulder Venture claimed a breach of the leases to avoid compensating them.

¶26 On summary judgment, Boulder Venture and Capitol Court Corporation claimed that Lee and Park failed to state a claim for the breach of the duty of good faith because they could not point to any evidence that Boulder Venture intentionally deceived them. They further alleged that "it appears that [the] real focus of this claim relates to plaintiffs' 'technical default' of their lease, and their resulting eviction. Even if these allegations are taken as true … these allegations do not support a claim for breach of the duty of good faith."

¶27 Lee and Park argued in their brief before the trial court that the defendants misconstrued their breach-of-good-faith claim:

> The defendants characterize the plaintiffs' position on good faith as nothing more than a contention that they acted in bad faith by insisting that plaintiffs had committed a

> "technical default." As demonstrated above, this effort to take advantage of a "technical default" was not the crux of their bad faith, but merely the culmination. The "technical default" did not, as defendants state in their brief … result in the plaintiffs' eviction. On the contrary, the defendants unlawfully evicted the plaintiffs by their actions prior to the time of the supposed "technical default", and then tried to take advantage of a supposed default to avoid their obligation to pay the plaintiffs to terminate their leases…. Boulder Venture's conduct in cutting hours, cutting services, cutting back public access to the store, all causing a huge drop in customers and revenue, negotiating with the plaintiffs causing them to believe they would be compensated when they moved out, and then sending out notices of termination in an attempt to avoid compensating them … was bad faith.

This claim is related to the constructive-eviction claim. As noted, Lee and Park submitted evidence sufficient to show disputed issues of material fact on that claim. They also presented evidence that Boulder Venture negotiated extensively with them to buy-out their leases. Lee testified that he started negotiating with Boulder Venture in October of 2000. According to Lee, they reached an agreement in January of 2001 whereby Boulder Venture would pay him $119,050.00 if Lee agreed to terminate the lease on February 28, 2001. Lee testified that he did not sign the agreement, however, because he was "very unhappy" about the decrease in shopping hours. Lee further submitted letters showing that the negotiations continued through March of 2001.

¶28 Park testified that he reached an oral agreement with Boulder Venture in January of 2001, but that Boulder Venture never sent a written agreement to him. Park also submitted a letter from Boulder Venture dated March 16, 2001, in which Boulder Venture agreed to pay $132,838.17 to Park based on a termination date of April 1, 2001. Park responded in a letter dated March 19, 2001, and informed Boulder Venture that he intended to: "vacate the store by March 31."

¶29 Finally, Schmidt testified that Park tried to pay his April rent on April 18, 2001, one day after the lease was terminated. According to Schmidt, Park brought the termination letter to Schmidt's office and told Schmidt that "he didn't understand it and he wanted to pay rent." Schmidt testified that he refused to accept Park's rent; when Park left a rent check on the front counter, Schmidt mailed it back to him.

¶30 A reasonable fact-finder could infer from this evidence, if proven, that Boulder Venture evaded the spirit of the negotiations when it terminated the leases and refused to compensate Lee and Park. *See* ***Amoco Oil Co. v. Capitol Indem. Corp.***, 95 Wis. 2d 530, 542, 291 N.W.2d 883, 890 (Ct. App. 1980) ("The existence or nonexistence of good faith as an issue is usually determined by the trier of fact."). Lee and Park alleged facts sufficient to raise a disputed issue of fact on their breach-of-the-duty-of-good-faith claim. We reverse and remand for a trial.

C. *Motion to Reconsider/Attorneys Fees and Costs*

¶31 We do not address the remaining issues—whether the trial court used the wrong legal standard when it denied the motion for reconsideration and whether the trial court erred when it awarded Boulder Venture and Capitol Court Corporation attorneys fees and costs—because our reversal of the summary judgment motion renders them moot on this appeal. *See* ***Skrupky v. Elbert***, 189 Wis. 2d 31, 47, 526 N.W.2d 264, 270 (Ct. App. 1994) (if a decision on another point disposes of the appeal, we need not decide the other issues raised).

By the Court.—Order and judgment reversed and cause remanded with directions.

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