**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**September 29, 2010**

**A. John Voelker**
**Acting 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. 2009AP2103-FT** **Cir. Ct. No. 2006CV2233**

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

---

**CUSTOM SERVICES UNLIMITED, LLC,**

**PLAINTIFF-APPELLANT-CROSS-RESPONDENT,**

**V.**

**MARQUETTE WAREHOUSE, LLC,**

**DEFENDANT-RESPONDENT-CROSS-APPELLANT,**

**RICHARD C. OLSON,**

**DEFENDANT.**

---

APPEAL from a judgment of the circuit court for Racine County: RICHARD J. KREUL, Judge. A*ffirmed in part; reversed in part and cause remanded.*

Before Neubauer, P.J., Anderson and Reilly, JJ.

¶1 PER CURIAM. Custom Services Unlimited, LLC, ("CSU"), appeals from that portion of the judgment of the circuit court that found that it had breached a lease agreement it had with Marquette Warehouse, LLC, and awarded attorney fees to Marquette. Marquette cross-appeals from that portion of the judgment that declined to award it damages for CSU's breach. CSU argues that the circuit court erred when it determined that CSU had waived its right to terminate the lease and when it awarded fees to Marquette on its breach claim. Marquette argues that the circuit court erred when it did not award Marquette actual damages for CSU's breach of the lease. Pursuant to this court's order and a presubmission conference, the parties have submitted memo briefs. *See* WIS. STAT. RULE 809.17 (2007-08).[1] After review of those briefs and the record, we affirm that portion of the judgment that decided the parties' claims against each other, but reverse the portion that awarded attorney fees to Marquette, and we remand the matter to the circuit court.

¶2 In March 2005, CSU leased about 30,000 square feet of commercial property from Marquette for one year. CSU manufactures corrugated paper products. In September 2005, the parties extended the lease for another year. Starting in November 2005, CSU complained to Marquette about the conditions of the premises, including leaks, lack of a sprinkler system, holes in walls, and the lack of proper heating. In October 2006, CSU informed Marquette that it was leaving the premises and ending the lease under the termination clause of the contract. In November 2006, CSU stopped paying rent and moved to a different location.

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶3 CSU then brought this action for declaratory judgment and for damages it alleged it suffered as a result of Marquette's breach of its duties under the lease. Marquette counterclaimed for unpaid rent and utility expenses from November 2006 forward.[2]

¶4 A trial to the circuit court was held. The court found that "the premises were unfit for the purpose for which they were leased," and that CSU "was deprived of the beneficial enjoyment of the premises." The court also found that CSU's president had inspected the premises before signing the lease, that he was familiar with the building because he had previously worked in it, and that he knew the condition of the building at the time he signed the lease. Further, the court found that: "it would have been obvious to even a casual observer that maintaining a heated building would be difficult by virtue of the structure itself, a large, open, metal building." The court also found that CSU had waited for "an extraordinary period of time" before it exercised its right to terminate the lease, and concluded that the delay from March until October was "an unreasonable time considering the gravity of [CSU's] complaints" about the leased premises. The court also found that although Marquette had failed to repair the premises as required by the lease, CSU failed to act timely and "waived the landlord's failure." The court consequently concluded that when CSU vacated the premises in November 2006, it breached the lease.

[2] In October 2006, Marquette brought a small claims action against CSU seeking eviction and damages. In this action, Marquette counterclaimed alleging that CSU had breached the lease by failing to pay the rent from November 2006 forward. Under a stipulation the parties agreed that Marquette would pursue its damages in this action instead of the small claims action.

¶5 The court also found that when CSU vacated, Marquette took possession of the leased property and paid the utilities. The court stated that:

> It is unclear as to whether the landlord took possession of the leased premises thus releasing the tenant from further rent payments or took possession of the leased premises in anticipation of rerenting the premises for the benefit of the tenant. If it is the former, then the tenant does not owe any rent under the lease because the landlord accepted the tenant's surrender of the premises. If it the latter, then the landlord did not notify the tenant that it was taking over the premises for the benefit of the tenant and there is no indication of what efforts, if any, the landlord made to rerent for the unexpired portion of the lease.

The court concluded that Marquette had accepted the surrender of the premises after it was abandoned by CSU, and thereby released CSU from any further liability under the lease. The court further concluded that Marquette was entitled to attorney fees under the lease.

¶6 CSU first argues that it did not waive its right to terminate the contract when it continued to pay rent to Marquette, and that it did not delay unnecessarily in exercising its right to terminate the lease. We will not disturb the circuit court's finding of facts unless they are clearly erroneous. ***Bence v. Spinato***, 196 Wis. 2d 398, 408, 538 N.W.2d 614 (Ct. App. 1995). The application of the set of facts to the terms of a commercial lease and the parties' rights under that lease are questions of law that we review independently. ***Id.***

¶7 CSU does not dispute that a party may waive contractual benefits and that the intent to waive may be inferred from the party's conduct. CSU argues, however, that waiver requires some affirmative conduct and that it did not engage in any course of conduct that was inconsistent with its right to invoke the lease's termination clause. The circuit court, however, found that CSU did engage in such a "course of conduct:" CSU remained on the premises and continued to

pay rent even though Marquette had breached the lease terms. The court found that CSU stayed on the premises until a business opportunity arose to move to another premise, and then "seized on old complaints as justification for its removal." The court, in essence, found that CSU did not have a good reason for waiting to exercise its rights under the contract. The circuit court properly determined that CSU waived its rights under the contract by failing to act on them within a reasonable amount of time.

¶8 Marquette argues that the circuit court erred when it found that Marquette had accepted the surrender of the premises and, therefore, was not entitled to actual damages for CSU's breach of the lease. Marquette argues that there was no evidence on this issue at trial, and the court "created this issue on its own." Marquette, however, filed a counterclaim seeking damages as a result of CSU's breach of the lease. The court found that Marquette "did not present any evidence [at trial] about what it did when it took over the premises after CSU left." With no specific evidence offered, the circuit court drew reasonable conclusions from the evidence it did have. Marquette has not explained to us why the circuit court's conclusion that there was no evidence on this issue was wrong. We are not convinced that the court erred, and we affirm on this issue.

¶9 CSU also argues that the circuit court erred when it awarded attorney fees to Marquette. We agree. Under the terms of the lease, CSU agreed to:

> pay and discharge all reasonable costs, attorney's fess and expenses that shall be made and incurred by Landlord in enforcing the covenants and agreements of the Lease, if Landlord is successful.

There is a similar clause awarding fees to the tenant.

¶10 Marquette was successful in defeating CSU's claims for breach of contract. Marquette, however, had a counterclaim against CSU for lost rent from the time CSU vacated the premises. CSU was successful in defeating this claim. Neither party recovered the damages it sought. In ***Shadley v. Lloyds of London***, 2009 WI App 165, 322 Wis. 2d 189, 776 N.W.2d 838, we construed a similar contract provision. We held that when the contract provided for attorney fees to a "successful" party, it was unfair to award the party who won the case the entirety of their fees when that party was only nominally successful at trial. ***Id.***, ¶21. We concluded that a more rational reading of the contract language would award the party a proportion of their attorney fees that equated to their success at trial. ***Id.***, ¶22. In this case, both parties succeeded in defeating the other parties' claim but neither party received the damages they sought. Because both parties were equally successful and unsuccessful, we conclude that neither party is entitled to fees.

¶11 For the reasons stated, we affirm the judgment of the circuit court in part, we reverse the part of the judgment awarding attorney fees to Marquette, and we remand the matter to the circuit court.

*By the Court*.—Judgment affirmed in part; reversed in part and cause remanded.

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