

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 25, 2011

A. John Voelker
Acting Clerk of Court of Appeals

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Appeal No. 2009AP2154

Cir. Ct. No. 2008CV220

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

CABINET INGENUITY & DESIGN, LLC,

PLAINTIFF-APPELLANT,

V.

**VILLAGE PARK DEVELOPMENT, LLC AND
LOKRE DEVELOPMENT COMPANY,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment and orders of the circuit court for Portage County: JOHN V. FINN, Judge. *Affirmed.*

Before Lundsten, P.J., Vergeront and Blanchard, JJ.

¶1 BLANCHARD, J. This case involves a contract dispute between a landlord, Village Park Development, LLC, and a tenant, Cabinet Ingenuity & Design, LLC, regarding a short-term commercial lease.¹ After a trial to the court, the court concluded in an oral ruling and written judgment and order that both the landlord and tenant breached the lease and were liable for damages. The tenant appeals the judgment and order, and also the order denying its motions for reconsideration and for a new trial, arguing that: (1) the landlord's breaches were material, excusing the tenant's nonperformance in failing to take occupancy and pay rent; (2) the court erred in calculating the damages to which the tenant was entitled; and (3) the court erred in not awarding it attorney fees and actual costs pursuant to the terms of the lease.

¶2 We affirm the circuit court on all three issues, on the grounds that (1) the court reasonably interpreted its own ambiguous judgment and order as having provided that the landlord's breaches were not material, and the findings of nonmateriality are not clearly erroneous, (2) the court's findings regarding damages are not clearly erroneous, and (3) the tenant's arguments regarding attorney fees are not developed.

BACKGROUND

¶3 Cabinet Ingenuity & Design entered into a lease agreement on February 28, 2007, with Village Park Development, under which Cabinet was to

¹ Village Park Development, LLC and Lokre Development Company were operating a joint venture with respect to the lease transaction with Cabinet Ingenuity & Design, LLC. Therefore, we refer to Village Park and Lokre collectively as the landlord, even though Lokre was not a party to the lease.

rent a commercial space from Village Park for twenty-eight months. The lease required the landlord to install a Heating Ventilation and Air Conditioning (HVAC) system and to obtain an occupancy permit from the city for the leased premises. The initial term of the lease was to commence on the first day of the month after the landlord received written documentation from a bank confirming approval of a business loan to the tenant.

¶4 The lease was amended by a Commencement Date Memorandum, which specified that: (1) the tenant was entitled to take possession of the premises on April 25, 2007; (2) the lease would commence on May 1, 2007; and (3) the first annual base rent was \$12,348.00, to be made in monthly installments of \$1,543.50. Rent was abated for four months, with payments required starting on September 1, 2007.

¶5 The tenant took possession of the premises in April 2007. The tenant worked as its own general contractor for improvement of the leased space in all areas except installation of the HVAC system. The landlord did not install the HVAC system until January 2008.

¶6 Starting in September 2007 and continuing through March 2008, the tenant made monthly payments of \$2,270.50, which included monthly rent payments and property taxes. Thereafter, the tenant stopped making payments, because it had spent the entire proceeds of a business loan obtained from the bank and no longer had the financial ability to make the payments.

¶7 In May 2008, the tenant brought an action against the landlord, alleging that the landlord breached several provisions of the lease, including failing to timely install a functioning HVAC system and failing to obtain an

occupancy permit. The landlord counterclaimed, alleging that the tenant breached the lease by failing to pay rent.

¶8 After a trial to the court, the court made an oral ruling and entered a written judgment and order on all disputed issues, concluding that both the landlord and tenant breached the lease. The court found that the landlord breached the lease by (1) failing to install a fully and properly functioning HVAC system by the rent commencement date of September 1, 2007, or within a reasonable time thereafter and (2) not obtaining an occupancy permit for the premises. The court found that the tenant breached the lease by not taking occupancy by mid-January 2008 (when the HVAC system was installed) and by not paying rent from April 2008 to April 2009.

¶9 The court awarded damages to both the landlord and tenant. The court awarded damages to the tenant for the money it spent on construction and improvement costs on the premises, the security deposit, and the monthly payments made from September 2007 through January 2008 for a total of \$51,822.42. The landlord was awarded damages for the monthly payments that the tenant did not pay from April 2008 through the end of the lease in April 2009 and late fees for a total of \$29,516.50. After offsetting the damages to the landlord, the court awarded the tenant damages in the amount of \$22,362.84.

¶10 The court declined to award either party attorney fees or costs under the lease on the grounds that “both sides lost.” The tenant also did not receive the damages it claimed for various items purchased for the business, the amount of the loan it borrowed to start the business together with interest on the loan, or lost profits.

¶11 The tenant filed a motion for reconsideration and a motion for a new trial on the issue of damages, arguing that the court's finding of material breach by the landlord excused the tenant's nonperformance and/or constituted a constructive eviction, and that the court erred in denying its requests for damages. The court made an oral ruling at the motions hearing and entered a written order denying both motions. The court concluded that it had found in its judgment and order that the landlord's breach was not material, and therefore the tenant was not entitled to the relief it sought. The court also reaffirmed its calculation of damages.

¶12 The tenant appeals the court's judgment and order and the order denying the tenant's motions for reconsideration and for a new trial, arguing that: (1) despite the court's later assertion to the contrary, the court found that the landlord's breaches were material, and the material breach excused the tenant's nonperformance; (2) the court erred in calculating the tenant's damages; and (3) the court erred in not awarding it attorney fees and actual costs pursuant to the terms of the lease. For the reasons discussed below, we affirm.

DISCUSSION

¶13 We begin by determining what the circuit court found regarding materiality and whether that finding is clearly erroneous. Next, we determine whether the court erred in calculating the tenant's damages. Finally, we determine that the tenant's argument that the court erred in not awarding the tenant attorney fees and actual costs is undeveloped, and therefore not an issue that we can fairly address.

I. Materiality of Landlord's Breaches

¶14 The parties disagree as to whether the circuit court made specific findings that two breaches by the landlord were material to the contract, and if so, whether the findings are supported by the record. If one party (here the landlord) materially breaches a contract, then performance by the other party (here the tenant) is excused. *Management Comp. Servs. Inc. v. Hawkins, Ash, Baptie & Co.*, 206 Wis. 2d 158, 183, 557 N.W.2d 67 (1996).

¶15 A breach is material if it destroys the essential object of the agreement. *Ranes v. American Family Mut. Ins. Co.*, 219 Wis. 2d 49, 57, 580 N.W.2d 197 (1998). Facts relevant to the determination of materiality include the character of the performance, the purpose expected to be served by it, the extent to which nonperformance defeats that purpose, and the reasons for the failure. *M&I Marshall & Ilsley Bank v. Pump*, 88 Wis. 2d 323, 333, 276 N.W.2d 295 (1979).

¶16 While one party's material breach of a contract frees the other party from its contractual obligation, a relatively minor breach does not excuse the other party from its contractual performance. *Management Comp. Servs. Inc.*, 206 Wis. 2d at 183.

A. Circuit Court's Finding Regarding Materiality of the Landlord's Breaches

¶17 We now turn to the circuit court's decision on materiality. Because there is ambiguity in the court's pronouncements, we first examine the record to determine what the court concluded. Although the parties do not address the language of the court's oral ruling, its written judgment and order, or the court's

interpretation of its judgment and order,² we must do so, because in order to determine whether the court's findings regarding materiality of the landlord's breaches were clearly erroneous, we must first determine what the court found. For the reasons discussed below, we conclude that the court found that the landlord's breaches were not material.

¶18 To determine whether we should give deference to the court's interpretation of its own prior judgment, we must first determine whether the court's judgment and order was ambiguous. If the judgment and order is ambiguous, we give "great deference" to the circuit court's interpretation of its own prior judgment to resolve the ambiguity unless the court's interpretation is "devoid of reason." *Schultz v. Schultz*, 194 Wis. 2d 799, 802, 535 N.W.2d 116 (Ct. App. 1995). This is because "resolution of the ambiguity is made based upon the judge's experience of trial or prior experience with the record." *Id.* at 808. Because we conclude that the court's judgment and order is ambiguous, we defer

² Instead of addressing the particulars of the circuit court's pronouncements on the question of whether the landlord's breaches were material, the parties make the following arguments.

The landlord's argument goes directly to the substantive argument that the court's conclusions must stand, because the landlord's breach did not excuse the tenant's nonperformance under the lease. The landlord does not address the question of whether the judgment and order was ambiguous or whether the court reasonably interpreted its judgment and order after the tenant questioned their meaning in the tenant's motion for reconsideration.

In contrast, the tenant contends that the court found that the landlord's breaches were material and erroneously concluded that, even though the breaches were material, that fact did not excuse the tenant's nonperformance as a matter of law. As we explain in the text, the court neither made that finding nor reached that erroneous legal conclusion. The tenant relies on one sentence in the written judgment and order that states that the landlord "*materially and substantially* breached the Lease," yet the tenant does not address the court's subsequent interpretation of this judgment and order, in which the court concluded that the court had found in its judgment and order that the landlord's breaches were not material.

to the circuit court's reasonable interpretation of its own prior judgment, and under that standard of review conclude that the court's interpretation is reasonable in light of the court's original judgment as a whole.

¶19 The determination of whether a judgment is ambiguous is a question of law that we review de novo. See *Schultz*, 194 Wis. 2d at 805. Written judgments are considered in context; it is not sufficient to interpret only a portion of a judgment. *Id.* “Ambiguity exists where the language of the written instrument is subject to two or more reasonable interpretations, either on its face or as applied to the extrinsic facts to which it refers.” *Id.* at 805-06.

¶20 On our de novo review, we look to the whole of the prior decision, including both the oral ruling and written judgment and order, which was reduced to judgment, to determine whether it is ambiguous. *Id.* at 806.

¶21 In an oral ruling that preceded the written judgment and order, the court stated several times that both parties breached the contract and were liable for damages. The court did not mention the issue of materiality, yet the court's conclusion in the oral ruling implied that none of the parties' breaches were material, because neither party was excused from performance under the contract, as would be the case with a finding of materiality.

¶22 The subsequent written judgment and order also found that both the landlord and tenant breached the lease and that both are liable for damages, again implying that none of the parties' breaches were material. However, one sentence in the written judgment and order provides that the landlord's breaches were material. Specifically, the court wrote that the

landlord *materially and substantially* breached the Lease by failing to have a proper and functioning HVAC system

completely installed and in good working condition by, at the latest, the rent commencement date of September 1, 2007 or within a reasonable time thereafter and by failing to obtain an occupancy permit for the premises pursuant to its obligations under the Lease.

(Emphasis added.) Additionally, the court did not award attorney fees or costs to either party because both parties “lost.”

¶23 We conclude based on this record that the court’s judgment and order is ambiguous. It is subject to two reasonable interpretations.

¶24 Because the judgment and order is ambiguous, we next consider its meaning. We affirm the circuit court’s interpretation of its own prior judgment and order, because it is not “devoid of reason.” *See Schultz*, 194 Wis. 2d at 802 (citation omitted).

¶25 The court interpreted its prior judgment and order at a hearing on the tenant’s motions for reconsideration and for a new trial, specifically stating that it was not making any new findings, and concluding that it had found that the landlord’s breaches were not material. Specifically, the court stated, “So I don’t think that the [landlord’s] breach destroyed the essential purpose of the lease. If, the Court drew that conclusion, then, of course, the [tenant] would be entitled to the relief that the [tenant] has asked [for].” The court did not refer specifically to the sentence in the written judgment and order providing that the breaches were material. Instead, we understand the court to have explained that it would not have awarded damages as it did if the landlord’s breach had been material and the tenant had been excused from performance. Essentially, the court explained that it did not misunderstand the underlying substantive law.

¶26 We affirm the circuit court’s interpretation of its prior ambiguous judgment and order because it is reasonable.

B. Whether Court’s Finding Regarding Materiality is Clearly Erroneous

¶27 Next, we determine whether the court’s finding that the landlord’s breaches were not material is clearly erroneous. The tenant argues that it proved at trial that the landlord’s failure to provide a functioning HVAC system and obtain an occupancy permit by the tenant’s expected opening date of June 1, 2007, or at the latest, the rent commencement date of September 1, 2007, destroyed the essence of the contract because the tenant could not occupy the premises to open its business. We disagree, because there is record support for the circuit court’s finding that the breaches were not material.

¶28 Whether a party’s breach is material is a question of fact. *Management Comp. Serv.*, 206 Wis. 2d at 184. We will not reverse the circuit court’s fact findings unless they are clearly erroneous. WIS. STAT. § 805.17(2) (2009-10). A finding is clearly erroneous if it is not supported by the record. *Royster-Clark, Inc. v. Olsen’s Mill, Inc.*, 2006 WI 46, ¶11, 290 Wis. 2d 264, 714 N.W.2d 530. Under the clearly erroneous standard, “even though the evidence would permit a contrary finding, findings of fact will be affirmed on appeal as long as the evidence would permit a reasonable person to make the same finding.” *Reusch v. Roob*, 2000 WI App 76, ¶8, 234 Wis. 2d 270, 610 N.W.2d 168 (citation omitted). Additionally, we search the record for evidence supporting the circuit court’s finding, not for evidence opposing it. *Mentzel v. City of Oshkosh*, 146 Wis. 2d 804, 808, 432 N.W.2d 609 (Ct. App. 1988).

¶29 The court concluded that neither the landlord's four-month delay in installing the HVAC system nor its failure to obtain the occupancy permit destroyed the essence of the contract, based on the following record facts.

¶30 As to installation of the HVAC system, the court found that the landlord's delay was patently unreasonable, but not a material breach. The breach was not material, because the lease did not state that time is of the essence. This conclusion is supported by the record and therefore not clearly erroneous.

¶31 As to the landlord's failure to obtain the occupancy permit, the court found that this did not destroy the essence, because the contract term was substantially performed by the landlord. The court found that the permit could have been approved in January 2008, based on the testimony from a city building inspector. The inspector testified that, based on his review of photographs of the system in January 2008, he would have approved the permit if a minor fix to the HVAC system had been made. Therefore, the court found that the contract term was substantially performed by the landlord, because the landlord completed the majority of the work required to obtain a permit and a permit could have been obtained at that time. Because the court's finding is supported by the record, we conclude that it is not clearly erroneous.

¶32 In sum, the court's finding of nonmateriality is not clearly erroneous and, therefore, we reject the tenant's argument that its nonperformance was excused.³

³ The tenant makes a related argument that the landlord's material breaches constituted constructive eviction, which excused its nonperformance, but this argument is foreclosed for the same reasons that the breaches were not material. A landlord constructively evicts a tenant and
(continued)

II. Tenant's Damages

¶33 The tenant contends that the court erred in denying its claim for two categories of damages. We disagree, and conclude that the court's findings regarding damages are not clearly erroneous.

¶34 When reviewing an award of damages, we apply a highly deferential standard of review. *Selmer Co. v. Rinn*, 2010 WI App 106, ¶28, 328 Wis. 2d 263, 789 N.W.2d 621. "If sufficient evidence supports a trial court's findings of damages, we must uphold the findings unless they are clearly erroneous." *Cianciola, LLP v. Milwaukee Metro. Sewerage Dist.*, 2011 WI App 35, ¶21, 331 Wis. 2d 740, 796 N.W.2d 806. "It is not [the reviewing court's] purpose to determine whether damage awards are high or low, nor to substitute [its] judgment for that of the jury or the trial court but rather to determine whether the award is within reasonable limits." *Selmer Co.*, 328 Wis. 2d 263, ¶28 (citation omitted).

¶35 "The fundamental basis for an award of damages for breach of contract is just compensation for losses necessarily flowing from the breach." *Sporleder v. Gonis*, 68 Wis. 2d 554, 559, 229 N.W.2d 602 (1975) (citation omitted). Therefore, "a party whose contract has been breached is not entitled to

releases the tenant from further obligations to pay rent if a landlord interferes with a tenant's possession or enjoyment of the premises so as to render it unfit for occupancy for the purpose for which it is leased. *First Wisconsin Trust Co. v. L. Wiemann Co.*, 93 Wis. 2d 258, 267-68, 286 N.W.2d 360 (1980). The interference must be substantial, depriving the tenant of full use and enjoyment of the premises for a material time, and must cause the tenant to abandon the premises within a reasonable time. *Id.* at 268. Because the court found that the landlord's breaches were not material, in part because the tenant could have occupied the space in mid-January, and these findings are not clearly erroneous, we also reject the tenant's argument that the landlord's breaches constituted constructive eviction.

be placed in a better position because of the breach than [the party] would have been had the contract been performed.” *Id.* (citation omitted).

A. Total Rent Obligation and Security Deposit under the Lease

¶36 The tenant contends that the court erred by not awarding the tenant its total rent obligation and security deposit under the lease, because the landlord’s breaches were material and therefore excused the tenant from its obligations under the lease.⁴ This contention is easily resolved based on our discussion above in section I., in which we concluded that the circuit court properly found that the landlord’s breaches were not material.

¶37 The court awarded the tenant damages to compensate it for the monthly payments it made from September 2007 to January 2008, because the tenant was paying the landlord for space it could not use due to the landlord’s delay in providing the premises as it was required to under the lease. The court also awarded the tenant damages equal to the \$1,000 security deposit. However, the court concluded that the landlord was entitled to collect the monthly payments lost by the tenant’s failure to pay them during a later period, April 2008 to April 2009, for two reasons. First, the landlord’s breach regarding the delay in installing the HVAC system and failing to obtain an occupancy permit were not material. Second, the landlord made reasonable efforts to rent the premises to another party.

⁴ Specifically, the tenant argues that it is entitled to additional damages in the amount of \$35,060.58. This includes \$29,519.58 that the court originally awarded to the landlord for the tenant’s breach of nonpayment, plus \$4,541.00 in rent the tenant paid for February and March 2008, and a \$1,000 security deposit.

¶38 Regarding materiality, as discussed above, the court found that the landlord's breaches were not material and we have concluded that this finding is not clearly erroneous. As to the court's finding that the landlord made a reasonable effort to re-rent the premises to mitigate damages, the tenant does not challenge this on appeal. Therefore, the tenant's failure to pay rent was not excused by the landlord's breach and the landlord is entitled to damages for the tenant's failure to pay rent. *See Management Comp. Servs. Inc.*, 206 Wis. 2d at 183 (one party's breach that is not material does not excuse the other party from its contractual performance).

B. Business Loan and Interest on the Loan

¶39 The tenant also requests that we remand for a new trial on damages, because it asserts that it is entitled to \$185,000, which is the amount of the loan it obtained to start the business, plus interest on the loan. The tenant asserts that it is entitled to these damages, because the loan was a condition precedent to the lease and the tenant obtained the loan and spent the loan on items to start its business in reliance on the landlord's anticipated fulfillment of its obligations of the lease. We conclude that the tenant's claimed expenses are not an appropriate measure of damages, because the court's finding that the landlord's breaches did not cause the tenant to exhaust its financial resources is not clearly erroneous.

¶40 The tenant's argument rests on the erroneous assertion that the court found that the landlord's breaches caused the tenant to exhaust its financial resources. Although the court did find that the tenant exhausted its financial resources in March 2008, the court specifically found that the landlord was not responsible for the tenant's financial situation.

¶41 The court’s finding that the landlord’s breaches did not cause the tenant to exhaust its financial resources is not clearly erroneous. Specifically, the court found that the tenant had borrowed the money with “speculative” profit expectations, and the fact that the tenant did not meet those expectations was not caused by the landlord’s breaches. The court found that the tenant’s profit expectations were not supported by credible evidence and the tenant concedes on appeal that it lacks concrete proof of its lost profits. The court also found that the landlord was not responsible for the interest due on the tenant’s loan, because the manner in which the tenant obtained financing for the lease and the risk it ran in borrowing money to open the business were contingencies too remote from the landlord’s conduct in breaching the contract.

¶42 Therefore, assuming without deciding that the tenant incurred the claimed expenses in reliance on the lease, the expenses are not an appropriate measure of damages. *See Sporleder*, 68 Wis. 2d at 559 (award for damages for breach of contract is “just compensation for losses necessarily flowing from the breach”).

III. Attorney Fees and Actual Costs

¶43 The tenant contends that the court erred in not awarding it attorney fees and actual costs under the contract. We affirm, because the tenant’s argument is undeveloped.

¶44 The contract provision at issue states: “If Landlord or Tenant take action to enforce any provision of this lease or the subject matter of this Lease, the losing party will pay to the Prevailing party all costs and expenses, including without limitation reasonable attorneys’ fees and court costs, incurred by the

successful party.” The court concluded that neither party was entitled to attorney fees under the provision because both parties “lost.”

¶45 The tenant argues that it is entitled to all of its attorney fees under the lease agreement, even assuming that the landlord’s breaches were not material. The tenant does not ask us to apply the proportional test under either *Shadley v. Lloyds of London*, 2009 WI App 165, 322 Wis. 2d 189, 776 N.W.2d 838, or *Borchardt v. Wilk*, 156 Wis. 2d 420, 456 N.W.2d 653 (Ct. App. 1990), which may be used to objectively apportion fees based on percentages by which a party prevails. Instead, the tenant asserts that it is entitled to *all* of its attorney fees, because it is the prevailing party. The tenant contends that it is the prevailing party because it was awarded a *greater* amount of damages than the landlord. In purported support of this argument, the tenant asserts only that the “the average person would conclude” that the tenant prevailed and the landlord lost. The tenant does not provide any legal authority for its argument.

¶46 Because the tenant does not provide any legal authority for its assertion that it is entitled to all attorney fees under the contract, we do not address this undeveloped argument. *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633.

CONCLUSION

¶47 We affirm the court’s judgment and order and order denying the tenant’s motions for reconsideration and for a new trial on the grounds that: (1) the court offered a reasonable interpretation of its own ambiguous judgment and order, as having concluded that the landlord’s breaches were not material, and the finding of nonmateriality is not clearly erroneous; (2) the court’s findings

regarding damages are not clearly erroneous; and (3) the tenant's arguments regarding attorney fees are not developed.

By the Court.—Judgment and orders affirmed.

Not recommended for publication in the official reports.

