



Nos. A09-859 and A09-995

STATE OF MINNESOTA
IN COURT OF APPEALS

Starlite Limited Partnership,

Respondent,

v.

Landry's Restaurants, Inc.,

Appellant.

OFFICE OF
APPELLATE COURTS

JUL - 7 2009

FILED

APPELLANT'S BRIEF, ADDENDUM, AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF ISSUES

1. Did the district court err in finding that the non-party tenant's Offer to Lease was properly accepted and valid?

The Offer to Lease explicitly stated, "If Landlord [Respondent] has not executed multiple copies of this Lease and returned at least one (1) fully executed copy to Tenant [a non-party] within six (6) days after the date of execution hereof by Tenant, *Tenant's offer to lease as provided for herein shall be deemed withdrawn, and this Lease shall be null, void, and of no force and effect*" (emphasis added). It is undisputed that Respondent did not execute the Offer to Lease within the time provided. Nonetheless, the district court ruled that a valid lease was formed.

Most Apposite Authority: Callender v. Kalscheuer, 184 N.W.2d 811 (Minn. 1971); Restatement Second, Contracts §§ 41, 60 (1981).

2. Did the district court err when it held, as a matter of law, that the non-party tenant waived Respondent's time of acceptance?

Under Minnesota law, waiver cannot be used to extend the time for acceptance of the Offer to Lease at issue. Moreover, even if waiver could extend the time for acceptance, issues of fact exist as to whether there was, in fact, a waiver. Nonetheless, the district court ruled that, as a matter of law, the non-party tenant had waived Respondent's time for acceptance.

Most Apposite Authority: Rooney v. Dayton-Hudson Corp., 246 N.W.2d 170 (Minn. 1976); TPI/CMS St. Paul Ltd. P'ship v. Expansion Enters., Inc., No. C5-94-1980, 1995 WL 296014 (Minn. Ct. App. May 16, 1995); Callender v. Kalscheuer, 184 N.W.2d 811 (Minn. 1971); Brenner v. Nordby, 306 N.W.2d 126 (Minn. 1981).

3. Did the district court err when it held, as a matter of law, that Respondent's Resident Statements constituted written demand under Appellant's Guaranty, and when it calculated the amount of damages due (including attorneys' fees)?

Respondent's own record demonstrates it did not intend the statements to act as a Demand Notice *under the Guaranty* – Respondent eventually sent a separate Demand Notice. Nonetheless, the district court ruled that the Resident Statements were sufficient to serve as a Demand Notice under the Guaranty, and it calculated Appellant's liability based on the date of the first unpaid Resident

Statement rather than the date of the Respondent's separate Demand Notice, making other calculation errors in the process.

Most Apposite Authority: Parsons v. Restaurant Enters. Group, No. C3-95-2023, 1996 WL 146468 (Minn. Ct. App. Apr. 2, 1996).

STATEMENT OF THE CASE

Starlite Limited Partnership (hereinafter "Starlite" or "Respondent") alleges that it entered into a lease with non-party Landry's Seafood House-Minnesota, Inc. (hereinafter "Seafood House" or "Tenant"), whereby Seafood House was to lease particular property pursuant to the terms and conditions of such alleged lease. Starlite also alleges that Landry's Restaurants, Inc. (hereinafter "Landry's" or "Appellant") guaranteed Seafood House's obligations under the purported lease. Starlite sued Landry's – but not Seafood House – under the Guaranty for breach of contract for past due rent and other fees and expenses. Starlite moved the district court for summary judgment. In an order dated March 17, 2009, Judge Regina Chu of the Fourth Judicial District Court granted Starlite's motion for summary judgment and awarded it \$194,395.78, for rent, taxes, interest and penalties, from May 2007 through December 2008, as well as attorneys' fees in an amount to be determined. Judgment on that order was entered on March 20, 2009. On May 13, 2009, the district court awarded Starlite attorneys' fees in the amount of \$23,291.14, and an amended judgment reflecting that amount was entered on May 14, 2009. Landry's appeals from the March 17, 2009, and May 13, 2009 orders and the judgment and amended judgment resulting therefrom.

STATEMENT OF FACTS

On April 30, 1998, Seafood House (a non-party in this action) extended a written offer to lease (the "Offer to Lease") certain property in Ramsey County, Minnesota from Starlite, supported by a parent guaranty (the "Guaranty") from Landry's. (A23.) The time of acceptance of the offer was expressly limited. Pursuant to Paragraph 18.13 of the Offer to Lease:

If Landlord [Starlite] has not executed multiple copies of this Lease and returned at least one (1) fully executed copy to Tenant [Seafood House] within six (6) days after the date of execution hereof by Tenant, *Tenant's offer to lease* as provided for herein ***shall be deemed withdrawn, and this Lease shall be null, void, and of no force and effect.***

(A22 (emphasis added).)

Separate from the Offer to Lease, Landry's executed a parent guaranty ("the Guaranty"), pursuant to which Landry's agreed to guarantee Seafood House's performance under "that certain Lease Agreement . . . dated April 30, 1998." (A26.) The Guaranty expressly limited any potential liability as follows:

Notwithstanding anything to the contrary contained herein, the guarantee referred to in clause (a) hereinabove shall be ***limited*** to an amount (the "Maximum Amount") equal to the ***rent, real estate taxes, utility costs and insurance premiums*** which would be payable under the Lease during the period (the "Calculation Period") ***beginning on the date on which Landlord [Starlite] makes written demand (a "Demand Notice") upon Guarantor*** to make payments or perform covenants ***pursuant to clause (a) hereinabove*** and ending on the earlier of the second anniversary of the date of the Demand Notice or the tenth anniversary of the rent commencement date under the lease.

(Id. (emphasis added).)

It is undisputed that, despite the six-day time limit for acceptance of Seafood House's offer, Starlite did not execute the Offer to Lease until May 11, 1998, five days after the deadline for acceptance. (A23.) By that time, pursuant to the terms of the offer, Seafood House's offer to lease had been withdrawn. (Id.)

Although Seafood House eventually took occupancy of the property and operated a Joe's Crab Shack restaurant thereon, (A2), it did so as a tenant at will (under terms that have not been established) because the Offer to Lease was withdrawn and, by its terms, null, void, and of no force and effect. (A22.)

Throughout the duration of Seafood House's occupancy of the property, Starlite sent Seafood House "Resident Statements" – effectively, invoices – stating the amount owed Starlite each month. (A2.) Starlite also sent copies of these same Resident Statements to Landry's. (Id.) Upon receipt of the Resident Statements, Seafood House paid rent each and every month from 1998 through May of 2007, when it vacated the property. (Id.) For several months after Seafood House vacated the property, Starlite continued sending the Resident Statements to Seafood House, who did not pay. (Id.) Similarly, Seafood House continued to send copies of the Resident Statements to Landry's. (Id.) The Resident Statements made no demand whatsoever of Landry's as a guarantor, nor did they mention the Guaranty or any of its provisions. They simply stated the total Seafood House owed each month, broken down into current and past due amounts. (A32-A50.) By its own admission, on January 29, 2008, Starlite first mailed Landry's a Demand Notice, demanding that Landry's, in its capacity as guarantor, pay

back rent allegedly due under the terms of the Guaranty. (A2, A51-A52.) Landry's denied liability, and this suit followed.

SUMMARY OF THE ARGUMENT

The district court should be reversed. Simply stated, Landry's cannot be liable under the Guaranty because the agreement it was to guarantee was never properly accepted and thus was void. It is undisputed that Starlite did not accept the Offer to Lease within the time provided for acceptance. When that time limit passed, the Offer to Lease was withdrawn, and pursuant to its clear and unambiguous language, the Offer to Lease, and consequently the Guaranty of "that certain Lease Agreement," was "null, void and of no force and effect." Yet despite this clear language, the district court found, as a matter of law, that Seafood House waived the deadline for acceptance. This conclusion is contrary to both the facts and the law. While the time for performance of terms of a *completed* contract may under particular circumstances be waived, conduct and representations cannot be used to extend the time for the *acceptance and formation* of contracts such as the Offer to Lease at issue.

Moreover, even if the Offer to Lease was valid, the district court incorrectly calculated damages under the Guaranty. The amount available under the Guaranty is limited to "rent, real estate taxes, utility costs and insurance premiums . . . beginning on the date on which Landlord makes written demand (a "Demand Notice") upon Guarantor to make payments" Starlite did not make a written demand under the Guaranty until January 29, 2008, but the district court, nonetheless, awarded damages for a period beginning in May 2007. The district court held that Starlite's Resident Statements – mere

statements of account sent every month in the general course of business reflecting rental charges – were sufficient to constitute the formal Demand Notice required under the Guaranty. The district court’s holding is belied by the fact that Starlite itself did not treat the Resident Statements as a Demand Notice. If upheld, the district court’s holding will eviscerate the separate requirement for contractual or statutory notice in virtually all commercial contexts where regular statements of account or invoices are sent.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews a district court’s grant of summary judgment de novo. Razink v. Krutzig, 746 N.W.2d 644, 649 (Minn. Ct. App. 2008). On appeal from a grant of summary judgment, this Court must consider two questions: (1) whether there are any genuine issues of material fact, and (2) whether the district court erred in its application of the law. State by Cooper v. French, 460 N.W.2d 2, 4 (Minn. 1990). This Court, like the district court, must view the evidence in the light most favorable to Landry’s, the nonmoving party. Nicollet Restoration, Inc. v. City of St. Paul, 533 N.W.2d 845, 847 (Minn. 1995). As the Court has previously recognized, summary judgment is an extraordinary remedy, a blunt instrument to be used only where it is clearly applicable. Katzner v. Kelleher Constr., 535 N.W.2d 825, 828 (Minn. Ct. App. 1995), aff’d, 545 N.W.2d 378 (Minn. 1996). It should be granted only when the moving party has established a right to judgment with such clarity as to leave no room for doubt. Drager v. Aluminum Indus. Corp., 495 N.W.3d 879, 882 (Minn. Ct. App. 1993).

II. THE DISTRICT COURT ERRED IN FINDING THAT THE PURPORTED LEASE WAS PROPERLY ACCEPTED AND VALID.

The Minnesota Supreme Court has expressly held that “[i]f the time for acceptance of an offer is limited . . . the limit is absolute and time is of the essence.” Callender v. Kalscheuer, 184 N.W.2d 811, 812 (Minn. 1971). That fundamental proposition has long been recognized in Minnesota. See, e.g., Cannon River Mfr’s Ass’n v. Rogers, 43 N.W. 792, 793 (Minn. 1889). Indeed, it is black letter law that “[a]n offeree’s power of acceptance is terminated at the time specified in the offer.” Restatement Second, Contracts § 41 (1981); see also id. at § 60 (“If an offer prescribes the time, place, or manner of acceptance its terms in this respect must be complied with in order to create a contract.”).

In this case, the purported lease by its own terms stated it was nothing more than an “offer to lease,” and it included a deadline and method for acceptance, with express consequences for failure to accept in a proper and timely manner. (A22.) It clearly and unambiguously states, “If Landlord has not executed multiple copies of this lease and returned at least one (1) copy to Tenant within six (6) days after the date of execution hereof by Tenant, *Tenant’s offer to lease as provided for herein shall be deemed withdrawn, and this lease shall be null, void, and of no force and effect.*” (A22 (emphasis added).) It is undisputed that Seafood House executed the document on April 30, 1998, but Starlite did not do so until May 11, five days after Seafood House’s offer to lease expired. Thus, under its plain language, the Offer to Lease was withdrawn, a

written lease was never formed, and the terms of the purported lease were “null, void, and of no force and effect.”¹

Callender is apposite. There the executor of an estate extended a written offer to sell real property that made up part of the estate. 184 N.W.2d at 812. The offer explicitly provided that the potential buyer would have to submit earnest money by February 5, 1968, if he wished to go through with the purchase. Id. The potential buyer submitted earnest money on February 8, 1968, three days after the stated expiration of the offer, and sued when the executor sold the property to another party. Id. The Minnesota Supreme Court upheld summary judgment for the executor: under the clear language of the offer, it expired three days before the potential buyer submitted earnest money. Id. Similarly, Seafood House’s offer to lease expired, and the Offer to Lease never became a valid contract to lease.

Because the Offer to Lease was never accepted, meaning that the offered lease was never formed and is void, Landry’s cannot be liable under the Guaranty of “that certain Lease Agreement . . . dated April 30, 1998.” Landry’s only undertook to guarantee the obligation under a written lease of specific terms, i.e., “*that certain Lease Agreement*”; it guaranteed nothing else. Under Minnesota guaranty law, “[t]he nature of the obligation

¹ Seafood House did occupy the premises and pay rent monthly, but this establishes, at most, a tenancy at will created by operation of law. See, e.g., Martin v. Smith, 7 N.W.2d 481, 483 (Minn. 1942); Hagen v. Bowers, 233 N.W. 822, 822-23 (Minn. 1930); Goodwin v. Clover, 98 N.W. 322, 323 (Minn. 1904); TPI/CMS St. Paul Ltd. P’ship v. Expansion Enters., Inc., No. C5-94-1980, 1995 WL 296014 at *2 (Minn. Ct. App. May 16, 1995). The terms of that tenancy have not been established, as Starlite chose not to sue Seafood House.

of the guarantor is affected by the character of the principal contract to which the guaranty relates.” Hungerford v. O’Brien, 34 N.W. 161, 161 (Minn. 1887). Here, the chief characteristic of “that certain Lease Agreement” is that it never existed in the first place, meaning the guarantor’s obligation is similarly nonexistent. Since there never was an underlying “Lease Agreement” for Landry’s to guarantee, it cannot be liable to Starlite for any breach of that lease. See Yellow Mfg. Acceptance Corp. v. Handler, 83 N.W.2d 103, 111 (Minn. 1957) (“Since the [principal’s] liability under the contract was extinguished . . . the guarantor’s liability was likewise discharged.”); see also Restatement Third, Suretyship and Guaranty § 34 (1996) (guarantor can generally raise any defense available to the principal).² Consequently, the Court should reverse the district court’s grant of summary judgment.

III. THE DISTRICT COURT ERRED IN FINDING, AS A MATTER OF LAW, THAT THE DEADLINE FOR ACCEPTANCE IN THE PURPORTED LEASE WAS WAIVED.

Despite the clear, unequivocal language of the Offer to Lease and the undisputed fact that the Offer to Lease expired before Starlite executed the document, the district court nonetheless granted summary judgment to Starlite on the grounds that Seafood House waived the deadline for acceptance. (See ADD5-ADD7.) The district court erred for two reasons: First, under Minnesota law, express time limits on acceptance cannot be waived by performance or representations under the circumstances present in this case. Second, even if the acceptance deadline could have been waived, the record does not

² It may be noted that Starlite did not dispute this argument below, and the district court did not pass on it.

support the district court's conclusion that there are no issues of material fact regarding waiver.

A. Seafood House's Express Time Limit For Acceptance Cannot Be Avoided by Waiver.

The district court confused waiver in the context of a contract which has already been formed with waiver in the context of a contract *yet to be formed*. At issue in this case is not a waiver of the time for performance of a *completed* contract, but rather an alleged waiver of the time within which an offer can be accepted in order to *form* a contract. Under Minnesota law, waiver cannot be used to avoid an express deadline for acceptance and form a contract under the circumstances present here. Thus, because the contract described in the Offer to Lease never formed, Landry's cannot be liable under its Guaranty of "that certain Lease Agreement."

Rooney v. Dayton-Hudson Corp., 246 N.W.2d 170 (Minn. 1976), shows the path to a correct decision. There, the Minnesota Supreme Court considered whether waiver could be used to avoid an explicit time limit on an offer. Rooney entered into an option contract with Dayton-Hudson to purchase the Dayton's building in downtown Rochester. Id. at 171. He paid \$30,000 for the option, which would remain open until October 31, 1973. If he did not buy the building by that date, Dayton-Hudson would keep his \$30,000; if he did, \$20,000 would be refunded to him and \$10,000 applied to the purchase price. Id. at 171-72. Rooney failed to purchase the building by the deadline, and Dayton-Hudson kept his money. Id. at 173. Rooney sued, claiming that, "through

their conduct and representations,” Dayton-Hudson had waived the deadline and extended it to January 15, 1974. Id.

The Supreme Court upheld summary judgment for Dayton-Hudson. In rejecting Rooney’s waiver argument, the court first turned to the case of Scheerschmidt v. Smith, 77 N.W. 34 (Minn. 1898), the first Minnesota case to apply the concepts of waiver and equitable estoppel to contracts within the statute of frauds.³ In Scheerschmidt, the Court held that “even as to contracts within the statute of frauds a waiver for nonperformance, according to the terms of the written contract, may be proven by parol.” Id. at 35. But the Scheerschmidt Court also took care to draw a distinction “between the contract itself, which is within the purview of the statute, and the subsequent performance, which is not.” Id. Applying Scheerschmidt to Rooney’s dispute with Dayton-Hudson, the Court stated:

Plaintiff would have us apply that principle [i.e., waiver] in order to establish an element of the contract of sale underlying his action, i.e., a continuing offer of sale through January 15, 1974. In Scheerschmidt, Mr. Justice Mitchell draws the critical distinction between the contract of sale and its performance, the former being within the statute and the latter without. Here . . . we are confronted not with a waiver of the time for performance of a completed contract of sale, but rather with the extension (by waiver) of the time within which an offer can be accepted in order to form a completed contract of sale. Equitable estoppel cannot accomplish that task and avoid the statute of frauds.

³ Had it been accepted, the Offer to Lease would have created a contract within the statute of frauds. Its term was to be for 20 years. (A5.) Contracts which convey interest in land (including leases with a term longer than one year) and contracts which by their terms cannot be completed in a year are subject to the statute of frauds. Minn. Stat. § 513.05 (2008).

Rooney, 246 N.W.2d at 176. Thus, waiver through “conduct and representations,” id. at 173, could not be used to extend the time within which a contract might be formed.

This Court considered a similar question in TPI/CMS St. Paul Ltd. P’ship v. Expansion Enters., Inc., No. C5-94-1980, 1995 WL 296014 (Minn. Ct. App. May 16, 1995). In TPI/CMS, the respondent landlord leased property to a Dairy Queen franchise, which had been opened using a loan from the appellant bank. Id. at *1. Without permission, the landlord substantially reduced the leased space, thereby voiding the lease. Id. Eventually, the Dairy Queen defaulted on the lease, and the bank stepped in, paying the back rent and operating the Dairy Queen for six months. Id. The bank assigned the lease to another party, which also defaulted. The landlord sued the bank and all parties who had operated the Dairy Queen, seeking rent owed under the lease. The district court granted summary judgment to the original Dairy Queen operator, holding that the landlord voided the lease when the space was substantially reduced without permission, a ruling the landlord did not appeal. However, summary judgment was granted to the landlord with respect to the bank, as the district court found the bank had waived the landlord’s breach that voided the lease. Id.

This Court disagreed, stating that “[b]ecause the Bank’s assumption agreement with respondent was tied to Expansion’s lease with respondent, . . . if respondent’s lease with Expansion was void, as the district court found, then there was no lease for the Bank to assume.” Id. Waiver could not cure the breach that voided the lease, because “under Minnesota law, continued occupation under a void lease does not constitute acquiescence

to the lease, but rather creates a tenancy at will.” Id. at *2. Thus, the bank could not be held liable for rent owed after it terminated occupancy.

Here, under the rule set forth in Rooney, the waiver of the deadline for acceptance of the Offer to Lease cannot be established by oral representations or performance as the district court held. Id. at 176; Callender, 184 N.W.2d at 812. The cases relied upon by the district court to support its finding of waiver are inapposite. For example, quoting Pollard v. Southdale Gardens of Edina Condominium Ass’n, Inc., the district court stated that “a written contract may be modified by subsequent acts and conduct of the parties to the contract.” 698 N.W.2d 449, 453 (Minn. Ct. App. 2005). But the question in Pollard, like every other case cited in the Order, is whether the breach of a contract *that already exists and is being performed* has been waived. That is simply not the case here, where *no contract was formed* (and thus there was no guarantee) because Starlite failed to accept Seafood House’s offer in a timely fashion. Furthermore, under the rule set forth in TPI/CMS, Seafood House’s occupancy under a void lease *cannot* constitute acquiescence to the terms of the lease; instead, it can only establish a tenancy at will, which was not guaranteed by Landry’s. Under Minnesota law, waiver cannot cure Starlite’s failure to accept Seafood House’s offer and form a valid lease prior to the deadline. Consequently, the district court should be reversed.

B. Issues of Fact Exist Regarding Waiver.

Even if waiver could cure Starlite’s failure to accept Seafood House’s offer – which it cannot – the district court should still be reversed. The district court held, as a matter of law, that Seafood House waived the deadline for acceptance. Seafood House,

not Landry's, is the only party that could have waived Starlite's untimely acceptance of the Offer to Lease. Starlite, however, chose to sue Landry's rather than Seafood House, and, as a result, there is scant evidence on the record regarding the alleged waiver by Seafood House. At a minimum, issues of fact exist as to waiver. Consequently, the district court should be reversed for this alternative reason as well.

The burden of proving a waiver – which is largely a question of intent – rests on Starlite as the party asserting the waiver. See Pruka v. Maroushek, 234 N.W. 641, 642 (Minn. 1934). Waiver “depends on the facts of each case and ordinarily presents a question for the jury.” Brenner v. Nordby, 306 N.W.2d 126, 127 (Minn. 1981). It is only the rare equitable estoppel case – “when only *one* inference can be drawn from the facts” – where summary judgment is appropriate. L & H Transp., Inc. v. Drew Agency, Inc., 403 N.W.2d 223, 227 (Minn. 1987) (emphasis added). Here there is at least a fact dispute as to waiver.

First, pursuant to Section 18.2 of the Offer to Lease “[n]o alteration, amendment, change or addition to this Lease shall be binding upon Landlord or Tenant unless reduced to writing and signed by each party.” (A20.) In the affidavit presented in opposition to Starlite's motion for summary judgment, Landry's states, under oath, that there are no modifications, written or otherwise, to the Offer to Lease. (A59.) There is no evidence in the record of a waiver that complies with the requirements of Section 18.13.

Second, at least *two* inferences can be drawn from the facts relied upon by the district court to support its finding of waiver. The district court relies on the fact that Seafood House operated a restaurant on the leased premises and paid all rent and taxes to

support its finding of waiver as a matter of law. (ADD6-ADD7.) But this does not leave room for only *one* inference sufficient to find a waiver. L & H Transp., Inc., 403 N.W.2d at 227. These facts could equally suggest a tenancy at will (if they do not indeed require the finding of such a tenancy as a matter of law).⁴ Indeed, this situation – a tenancy at will created when the lessee takes occupancy of property under a void or nonexistent lease and pays rent on a regular basis – is seen repeatedly in Minnesota law. See, e.g., Martin, 7 N.W.2d at 483; Hagen, 233 N.W. at 822-23; Goodwin v. Clover, 98 N.W. at 323; TPI/CMS, 1995 WL at *2. Consequently, the district court should be reversed.

IV. THE DISTRICT COURT ERRED IN CALCULATING THE AMOUNT OF LIABILITY UNDER THE GUARANTY.

Assuming, arguendo, that the Offer to Lease was accepted, creating a valid and enforceable lease, the district court nevertheless should be reversed because it erred in calculating Landry's liability under the Guaranty. Pursuant to the language of the Guaranty, Landry's potential liability is limited to rent, taxes, and certain other costs accrued during the "Calculation Period," a time fixed as described in Paragraph 1 of the Guaranty. (A26.) Specifically, the Calculation Period begins to run "on the date on which Landlord makes written demand (a 'Demand Notice') upon Guarantor to make payments" (Id.) The Calculation Period ends on "the earlier of the second anniversary of the date of the Demand Notice or the tenth anniversary of the rent

⁴ Landry's would not be liable under the Guaranty for breach of such a lease. The Guaranty is expressly limited to "that certain Lease Agreement . . . dated April 30, 1998, between [Starlite and Seafood House]." (A26.) A tenancy at will created by operation of law when Seafood House took occupancy is not "that certain Lease Agreement" referred to in the Guaranty.

commencement date under the lease.” (Id.) Starlite did not make written demand on Landry’s until January 29, 2008. Nevertheless, the district court awarded damages accruing beginning on May 2007 – nine months prior to the Demand Notice.

In support of its conclusion, the district court held, as a matter of law, that Resident Statements – statements of account sent in the general course of business to Seafood House and Landry’s (even when Seafood House was paying rent) – constituted a sufficient Demand Notice under the Guaranty. Since the first unpaid Resident Statement was sent in May 2007, the district court held that this was the date on which the Calculation Period began. (ADD9.) The district court’s conclusion is not supported by the facts or the law.

First, Starlite admitted that it did not provide Landry’s with a Demand Notice under the Guaranty until January 29, 2008. In his affidavit in support of Starlite’s motion for summary judgment, Robert Kueppers, an authorized representative for Starlite, stated under oath, “[o]n January 29, 2008, Starlite provided Landry’s with a written demand for payment.” (A2, A51-52.) Kueppers then refers to that written demand as a “Demand Notice.” (A2.) Indeed, the mere fact that Starlite sent the January 29, 2008 Demand Notice shows that it treated it as something separate and apart from the routine Resident Statements.

Second, the Guaranty specifically states that the Demand Notice required by the Guaranty shall ask Landry’s to “make payments or perform covenants *pursuant to clause (a) hereinabove.*” (A26 (emphasis added).) Nothing on the Resident Statements asks Landry’s to do anything under the Guaranty – they are Resident Statements for payment

of rent from Seafood House, demanding no specific action of Landry's whatsoever. (See A32-A50.) The Guaranty is not mentioned anywhere on them; clause 1(a) of the Guaranty is not mentioned anywhere on them; and, though the statements do say that money is due and owing, nowhere do they ask Landry's, rather than Seafood House, to pay. Thus, they are not sufficient to serve as a Demand Notice under the Guaranty.

This Court dealt with a similar situation in Parsons v. Restaurant Enters. Group, No. C3-95-2023, 1996 WL 146468 (Minn. Ct. App. Apr. 2, 1996). In Parsons, the lessee restaurant stopped paying rent to the landlord in 1988 and vacated the property in December of 1989. In February of 1990, the landlord's agent sent the lessee a letter saying that the lease would not be terminated and the lessee remained liable. The landlord sold its interest in the property, and the new owners, pursuant to a clause in the lease agreement, reentered the property. They then sued the lessee for the rent due under the lease. The lessee argued that the new owners had terminated the lease by reentering without providing the required notice, while the new owners claimed that the February 1990 letter saying that the lessee remained liable was sufficient notice of default. Id. at *1-2.

This Court upheld summary judgment for the lessee. The lease required notice of "violation, nonperformance, or breach" before reentry. Id. at *2. While the February 1990 letter explicitly stated that the lessee remained liable under the lease, it did not refer to any "violation, nonperformance, or breach." Thus, it was insufficient as a matter of law to serve as the notice required before reentry. Id. at *3. As in Parsons, the Resident

Statements at issue here are insufficient to serve as the Demand Notice required by the Guaranty.

Finally, the implications of the district court's conclusion are troubling. The holding would eviscerate contractual or statutory notice requirements in virtually all commercial contexts where regular statements of account or invoices are sent. If this holding were to stand, it would mean that routine invoices or statements of account would be transformed into statutory or contractual demand notices whenever an account became past due. If Landry's is liable under the Guaranty, the Calculation Period should begin no earlier than January 29, 2008, when Starlite sent the first Demand Notice conforming to the Guaranty.

In addition to this mistake, *even if* the Resident Statements are sufficient to serve as a Demand Notice conforming to the Guaranty, meaning the district court determined the length of the Calculation Period correctly, the district court nonetheless erred by awarding damages exceeding the "Maximum Amount" allowed under the Guaranty.⁵ Under the Guaranty, the Maximum Amount of Landry's liability is an amount equal to the sum of (1) rent, (2) real estate taxes, (3) utility costs, and (4) insurance premiums incurred during the Calculation Period. (A26.) The record before the district court was completely silent as to utility costs and insurance premiums that would be payable during the Calculation Period. Thus, Landry's would only be liable, if at all, for an amount equal to rent, real estate taxes, and tax penalties from the date of the Demand Notice.

⁵ Of course, if the district court determined the length of the Calculation Period incorrectly, the Maximum Amount would be less than this.

(Id.) Nevertheless, the district court awarded not only the full amount of rent, real estate taxes, and tax penalties from the date of the Demand Notice, but also interest and fees that caused the total award to exceed the Maximum Amount. Accordingly, if this Court concludes that Landry's is liable under the Guaranty, the matter should be remanded for recalculation of damages.⁶

CONCLUSION

For the reasons explained above, the March 17, 2009 and May 13, 2009 Orders of the District Court, and the judgments resulting therefrom, should be reversed and remanded with instruction to enter summary judgment in favor of Landry's,⁷ or, at a minimum, remanded for recalculation of damages.

⁶ The district court determined the amount of Starlite attorneys' fees pursuant to the Guaranty. If this Court should find that Landry's has no liability under the Guaranty, the district court's award of fees should be entirely reversed. If this Court remands this case to the district court for recalculation of Landry's liability, the amount of fees should also be recalculated, and the district court should not be allowed to award *additional* attorneys' fees to Starlite for fees associated with this appeal and the resulting remand for recalculation. Allowing the district court to do so would penalize Landry's for successfully defending its rights under the Guaranty, a perverse and inequitable result.

⁷ Landry's requested entry of summary judgment in its favor below. (ADD7.) Under Minnesota law, courts are empowered to grant summary judgment to the non-moving party if it is appropriate. See Anderson v. Lappegaard, 224 N.W.2d 504, 510 (Minn. 1974).

Dated: July 6, 2009

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