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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1451**

Jack Christy,
Respondent,

vs.

Douglas Berends,
Appellant,

BES Auto Service, et al.,
Defendants.

**Filed July 22, 2008
Reversed
Schellhas, Judge**

Hennepin County District Court
File No. 27CVHC07-3557

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Considered and decided by Hudson, Presiding Judge; Shumaker, Judge; and
Schellhas, Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant-tenant challenges a judgment of eviction. Because respondent-landlord waived the breach of a lease provision that prohibits subleasing when it accepted rent with knowledge of the sublease, we reverse. Appellant also argues that his corporation was the tenant and was improperly served, that any breach lacked materiality, and that respondent was required to terminate the lease before commencing an eviction action. Because the issue of respondent's waiver of the breach is dispositive, we need not address the other arguments.

FACTS

Appellant Douglas Berends, d/b/a Auto Mart, Inc., seeks review of a district court order affirming a referee's judgment of eviction against appellant.

Appellant is the owner and president of Auto Mart, Inc. On August 28, 2000, respondent Jack Christy leased property in Minneapolis to appellant and/or Auto Mart.¹ The lease term is five years with a five-year renewal option for appellant at a higher level of rent. Appellant reports that the used-car lot on the property was closed by the City of Minneapolis and that he spent four years bringing the property into compliance with the city's requirements. Appellant argues that after completion of his compliance efforts, the rental value of the property was greater than the rental figure contained in the lease and

¹ The parties dispute whether appellant or Auto Mart is the tenant. This question is relevant only to the service-of-process issue. As noted above, we do not reach this issue.

that at this point, his relationship with respondent deteriorated. Five years into the lease, appellant exercised the five-year renewal option. Respondent commenced eviction proceedings, claiming that appellant had not renewed the lease, but appellant prevailed and remained in possession of the property.

The lease prohibits subleasing without respondent's permission, as follows:

Tenant may not assign this Lease, lease the Property to anyone else (sublet), sell this Lease or permit any other person to use the Property without the prior written consent of the Landlord. If Tenant does any of these things, Landlord may terminate this Lease. Any assignment or sublease made without Landlord's written consent will not be effective.

In addition to allowing respondent to terminate the lease in the event that appellant sublets the property, the lease provides that if appellant does not pay the rent or "violates any agreement in [the] Lease" then respondent "may take possession of the Property. If [appellant] does not move out, [respondent] may bring an eviction action."

Beginning on February 1, 2007, appellant sublet a portion of the property to Llamar Miguel Flores for \$1,000 per month. Appellant did not notify respondent of the sublease and did not obtain written permission of respondent as required by the lease. When respondent drove to the property on or about April 26, 2007, he discovered the sublessee in possession of part of the property and immediately took action to evict appellant and the sublessee.

Appellant paid rent to respondent by automatic transfer into respondent's bank account on the 4th or 5th day of each month. Before effecting service of process of the eviction action upon appellant, respondent received appellant's automatic deposit of rent

for May 2007. Because respondent was hospitalized and unable to testify, respondent's wife, Bonneigh Mae Christy, testified on cross-examination about the receipt of the May rent:

COUNSEL: Have you ever made any attempt to return the rent that Auto Mart paid?

CHRISTY: Return it?

COUNSEL: Yes.

CHRISTY: Why would I return his rent?

COUNSEL: The question was only whether you had made any attempt to return that rent.

WITNESS: No.

...

COUNSEL: Do you have any reason to believe that Mr. — that your husband ever tried to return rent to Mr. Berends?

CHRISTY: Why would he return rent to him when he's been getting rent from his subleasing to cover his rent payment?

COUNSEL: My question was only, do you have any reason —

CHRISTY: No.

On about May 18, appellant notified Flores by letter that he would have to vacate the premises by June 30. Flores vacated the premises on May 23.

The eviction matter was heard before a housing court referee, who granted respondent judgment of eviction. Appellant requested review by a district court judge. The district court affirmed the referee's order, and this appeal follows.

DECISION

An eviction is a summary proceeding to determine the present possessory rights to property. *Amresco Residential Mortgage Corp. v. Stange*, 631 N.W.2d 444, 445-46 (Minn. App. 2001). An eviction action may be brought against a person who “unlawfully detains or retains possession of real property.” Minn. Stat. § 504B.301 (2006). The

district court's findings of fact will be upheld unless they are clearly erroneous. *Minneapolis Cmty. Dev. Agency v. Smallwood*, 379 N.W.2d 554, 555 (Minn. App. 1985), *review denied* (Minn. Feb. 19, 1986)). But a district court's decision on a legal issue is reviewed de novo. *Frost-Benco Elec. Ass'n v. Minn. Pub. Utils. Comm'n*, 358 N.W.2d 639, 642 (Minn. 1984).

Appellant argues that respondent waived any sublease-based breach of the lease when respondent accepted rent from appellant with knowledge of the sublease. Respondent argues (1) that appellant waived this defense because appellant did not plead it in district court; (2) appellant's breach continued after May rent was accepted and therefore appellant's breach of the lease was not waived; and (3) respondent did not intend to waive appellant's breach based on the sublease and therefore no waiver could occur. The housing court referee concluded that appellant waived its defense of waiver because it was not pleaded and, alternatively, that even if appellant did not waive the defense, its breach due to the sublease continued after May rent was accepted and respondent did not intend to waive future breaches and therefore the breach was actionable.

We conclude that appellant did not waive the defense of waiver. Under Minn. R. Civ. P. 15.02, if an issue is litigated, it should be treated as if it had been pleaded. Rule 15.02 applies in this case because there is no inconsistent housing court rule. *See* Minn. R. Gen. Pract. 601 (stating that housing-court rules apply to housing-court proceedings in Hennepin and Ramsey counties, but that the rules of civil procedure also apply "where not inconsistent"). The issue of respondent's waiver was litigated when testimony

addressing this question was taken at the hearing. Thus, we treat appellant's defense of waiver as if it had been pleaded and, accordingly, not waived. Interpretation of the rules of civil procedure presents a legal question and therefore we do not defer to the district court's conclusion on this issue. *Rubey v. Vannett*, 714 N.W.2d 417, 421 (Minn. 2006). Because appellant's defense of waiver was not waived, we will consider the merits of the challenge to the district court's alternate conclusion that the breach was not waived when respondent accepted rent with knowledge of the breach because the breach continued after acceptance of the May rent.

Conditions constituting a continuing or ongoing breach of a lease are waived by the acceptance of rent only as to past breaches. *Gluck v. Elkan*, 36 Minn. 80, 81, 30 N.W. 446, 446 (Minn. 1886), *cited with approval in Priordale Mall Investors v. Farrington*, 411 N.W.2d 582, 584 (Minn. App. 1987). Violations which continue after rent has been accepted are considered new violations and are not waived. *Priordale Mall*, 411 N.W.2d at 584. In *Gluck*, the supreme court held that the breach of a lease condition that a stairwell be kept clean was continuing and "[t]he receiving of rent from month to month would be effectual as a waiver for the past breach of it, but that would not relieve the tenant from the duty of performance in the future." 36 Minn. at 81, 30 N.W. at 446. The supreme court held that the continuing breach after the last rental payment justified the landlord's termination of the lease. *Id.* Under *Gluck*, if the sublease in this case is treated as an ongoing breach, the breach was actionable despite acceptance of rent because it continued after the last rent payment.

Appellant argues that a sublease is not treated as an ongoing breach, citing *Zotalis v. Cannellos*, 138 Minn. 179, 164 N.W. 807 (1917). *Zotalis* dealt with two types of breaches, subleases and gambling. *Id.* at 180-81, 164 N.W. at 807-08. The supreme court addressed breach based on three subleases by treating each as a new, separate breach. *Id.* The first sublease occurred with the knowledge and consent of the landlord and continued through the appellate proceedings. *Id.* at 180, 164 N.W. at 807. The second sublease occurred without the landlord's knowledge or consent and its duration was not specified. *Id.* After the tenant sublet the property twice, it was sold and the new landlord, knowing of both breaches, accepted rent. *Id.* at 180, 164 N.W. at 808. After the purchase, the tenant entered into a third sublease. *Id.* After this sublease, the new landlord did not accept rent. *Id.* at 180-81, 164 N.W. at 808. Breaches based on the first two subleases were held to be waived by the acceptance of rent, even though at least the first sublease continued after the last rent payment was accepted. *Id.* But because after the third sublease, the landlord "did nothing either by accepting rent or otherwise to waive that breach," the third sublease was an actionable breach. *Id.* at 181, 164 N.W. at 808. Appellant argues that *Zotalis* stands for the proposition that a sublease is not deemed an ongoing or continuing breach not waived by a landlord's acceptance of rent but, rather, is deemed a breach waived in its entirety by a landlord's acceptance of rent with knowledge of the sublease.

We agree with appellant. We also read the *Zotalis* court's treatment of the gambling breach to further support the proposition that subleases are not subject to the ongoing-breach rule of *Gluck*. After refusing to apply *Gluck* to an ongoing sublease, the

Zotalis court applied *Gluck* in holding that because the breach of gambling was ongoing after rent was accepted, the gambling breach was actionable. *Id.* Thus, in *Zotalis*, where two types of ongoing breaches were present, subleases and gambling, the ongoing-breach rule of *Gluck* was applied only to gambling. The landlord was deemed to have waived his right to eviction for the ongoing sublease breach where he knew about the breach when he accepted rent. We conclude that under *Zotalis*, ongoing subleases are not subject to the ongoing-breach rule of *Gluck*. A breach based on a sublease known to a landlord when rent is accepted is waived in its entirety.

Respondent and the housing court referee relied on *Priordale Mall* for the proposition that future breaches cannot be waived without a finding that the landlord *intended* to waive future breaches. In *Priordale Mall*, this court addressed a breach that ceased before the landlord accepted rent. 411 N.W.2d at 585. In *Priordale Mall*, we considered waiver in regard to a lease provision that contemplated the possibility of waiver by acceptance of rent and specifically provided that acceptance of rent would not constitute a waiver of a subsequent breach. We agreed with the landlord that under the lease provision, “acceptance of rent alone would not constitute waiver absent a showing of some intent on the part of a landlord.” *Id.* But we noted that “such intent need not be express and may be implied from a landlord’s action.” *Id.* *Priordale Mall* did not address a sublease and did not address *Zotalis* other than to cite it for the rule that acceptance of rent waives past breaches known to the landlord. Nothing in *Priordale Mall* limits the applicability of *Zotalis* to this case. Under *Zotalis*, the breach based on

the sublease to Flores was waived in its entirety when respondent accepted rent with knowledge of the sublease.

In this case, although waiver through acceptance of rent is complicated by the fact that rent was paid through automatic electronic transfer, the testimonial evidence clearly establishes that respondent intended to accept the May rent and made no effort to return it to appellant. Because respondent accepted rent with knowledge of the sublease, the breach based on the sublease was waived, and the referee's holding to the contrary was erroneous. We therefore reverse. Because we reverse based on waiver, we do not reach appellant's other arguments.

Reversed.