STATE OF MINNESOTA
IN COURT OF APPEALS
A10-914

Lorentz Ebner Real Estate, LLC,
Appellant,

vs.

Healthcare Waste Solutions, Inc.,
d/b/a Healthcare Waste Solutions of Minnesota,
Respondent.

Filed February 8, 2011
Affirmed
Crippen, Judge[*]

Anoka County District Court
File No. 02-CV-08-3137

Brian M. Sund, Ryan R. Dreyer, Kathleen M. Ghreichi, Morrison Fenske & Sund, P.A., Minnetonka, Minnesota (for appellant)

Jack Young Perry, Aaron G. Thomas, Briggs & Morgan, P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Wright, Presiding Judge; Larkin, Judge; and Crippen, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

CRIPPEN, Judge

In this commercial lease eviction action, the district court determined that appellant landlord Lorentz Ebner Real Estate, LLC (LERE) had no valid basis to evict respondent tenant Healthcare Waste Solutions, Inc. (HWS). There being no merit to appellant's several assertions of valid grounds for eviction, we affirm.

FACTS

HWS entered into an agreement in June 2007 to lease a Fridley, Minnesota, commercial building from LERE for the tenant's medical waste processing business. On March 3, 2008, HWS terminated the employment of Steve Lorentz, who had served as plant manager for HWS at the Fridley facility, but who also had a 50% ownership interest in LERE. In May 2008, LERE began eviction proceedings, claiming that HWS failed to make certain repairs and improvements required by the lease. Following a court trial, the district court dismissed LERE's action.

D E C I S I O N

1.

LERE first argues that the district court erred by rejecting its claim that HWS violated the lease agreement when it failed to install a moisture control ventilation system. The district court determined that LERE did not provide prior written consent for HWS to install a moisture control ventilation system. This finding is supported by the record and is not clearly erroneous. In none of the e-mail exchanges between the parties did LERE provide its unequivocal consent for HWS to proceed with the project.

LERE argues that HWS was not required to obtain prior written consent to install a moisture control ventilation system because section 6.1 of the lease agreement unambiguously provides prior consent for the project. Section 6.1 states the tenant's obligation to maintain the premises, specifically addressing work of painting, parking lot improvements, and installation of a moisture control ventilation system, with repairs of moisture damage, by December 31, 2007. But this section further states that "if any of Tenant's obligations pursuant to this Section 6.1 involve any structural improvements, or any building system, including roofing, heating, ventilating and air conditioning, Tenant shall not undertake any maintenance, repair or replacement thereof without Landlord's prior written consent which may not be unreasonably withheld."

Whether a contract is ambiguous is a question of law reviewed de novo. *Carlson v. Allstate Ins. Co.*, 749 N.W.2d 41, 45 (Minn. 2008). A contract may be considered ambiguous "if its language is reasonably susceptible to more than one interpretation." *Brookfield Trade Ctr., Inc. v. Cnty. of Ramsey*, 584 N.W.2d 390, 394 (Minn. 1998). "In interpreting a contract, the language is to be given its plain and ordinary meaning." *Id.* "[W]hen a contract is unambiguous, a court gives effect to the parties' intentions as expressed in the four corners of the instrument, and clear, plain, and unambiguous terms are conclusive of that intent." *Knudsen v. Transp. Leasing/Contract, Inc.*, 672 N.W.2d 221, 223 (Minn. App. 2003), *review denied* (Minn. Feb. 25, 2004).

There is no merit in LERE's construction of the lease agreement as providing all the necessary consent for the moisture control ventilation system project. Section 6.1 unequivocally requires consent for any work involving structural improvements or

building systems, and it is evident in the record that the moisture control ventilation system involves either or both of these. And although section 6.1 anticipates that a moisture control ventilation system will be installed, it does not state that HWS may begin such a project without LERE's consent. Further, section 10.1 of the lease agreement contains an additional requirement that HWS "not make any alternations, additions, or improvements in or to the Premises, including, but not limited to, penetration of the roof or walls without the prior written consent of [LERE]."

In addition, the parties' undisputed course of conduct, where consent for the project was continually sought and withheld, resolves any ambiguity in the lease agreement or otherwise constitutes a modification of the contract. *See Yaritz v. Dahl*, 367 N.W.2d 616, 618 (Minn. App. 1985) ("It is well settled that the conduct of contracting parties may be evidence of a subsequent modification of their contract"); *see also Larson v. Hill's Heating and Refrig. of Bemidji*, 400 N.W.2d 777, 781 (Minn. App. 1987) ("[A] written contract can be varied or rescinded by oral agreement of the parties, even if the contract provides that it shall not be orally varied or rescinded"), *review denied* (Minn. Apr. 17, 1987).

LERE argues in the alternative that even if it did withhold consent for the project, it was not unreasonable for it to do so. Section 6.1 of the lease specifies that necessary consent "may not be unreasonably withheld." LERE argues that its rejection of a March 21, 2008 proposal by HWS was reasonable because HWS's contractor cautioned about certain risks inherent with the plan. But the record indicates that LERE refused to even review this plan or discuss how to address the contractor's concerns because HWS

had not obtained city approval. Yet the contractor would not prepare engineered plans and seek city approval until it was hired by HWS—something HWS could not do unless it had LERE's prior written consent.

Accordingly, the district court did not err by dismissing LERE's claim that HWS violated the lease by failing to install a moisture control ventilation system. Because we conclude that a violation of the lease has not occurred, we have no occasion to examine the additional issues regarding this claim that are raised by LERE.

2.

LERE argues that repairing moisture damage in the facility, even without a new system, was an independent obligation that HWS failed to meet, and therefore the district court erred by not concluding that HWS breached the lease. The lease agreement provides that HWS must "[i]nstall moisture control ventilation system and repair moisture damage by December 31, 2007." The district court determined that "[r]epair of moisture damage was a moot point until the new ventilation/moisture system was installed. Until a new system was installed, damages would continue."

Although LERE argues that installing a moisture control system and repairing moisture damage are two separate and distinct obligations, section 6.1 pairs them together in one clause. This language indicates that the two tasks are connected and interdependent. The record also supports the district court's factual finding that remediating moisture damage was dependent upon installing the moisture control system. *See* Minn. R. Civ. P. 52.01 (stating that findings of fact are not set aside unless clearly erroneous). Jeff Gardner, chief engineer and plant operations manager for HWS, testified

that the building would continue to experience mold problems, despite any efforts to combat it, until the moisture control system was installed. Failure to remediate moisture damage by December 31, 2007, was not a valid basis for eviction.

3.

LERE argues that the district court erred by concluding that HWS was not in violation of the lease because of failure to make flooring repairs. The court determined that HWS did not breach the lease because the facility's flooring was compliant with government regulations and because any deterioration of the flooring occurred prior to the lease date.

Section 6.1 of the lease agreement requires the tenant to "maintain" the premises in good order and condition, including repairs and ordinary maintenance. This is the exclusive provision on the tenant's duties to repair preexisting conditions, and it does not include any flooring repairs. HWS was not obligated to repair flooring damage that pre-dated the lease.

LERE challenges the district court's factual findings regarding the flooring. "On appeal, a [district] court's findings of fact are given great deference, and shall not be set aside unless clearly erroneous." *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999). "If there is reasonable evidence to support the [district] court's findings of fact, a reviewing court should not disturb those findings." *Id.*

The district court's finding that any flooring damage pre-dated the lease is supported by the record. Mark Fritz, who was transportation manager at HWS from 2006 to 2009, testified that there was little change in the flooring's level of wear during the

period of lease. Gardner also testified that "[t]he floor was essentially in the same condition," as it was when the parties entered into the lease. Additionally, Anoka County inspector Laura Schmidt, who inspected HWS's Fridley facility multiple times a year beginning in 2004, testified that the flooring was in roughly the same condition as it had been since prior to the lease date.

LERE argues that the district court's finding is clearly erroneous because Fritz acknowledged that some additional wear occurred to the section of the flooring underneath where a second compactor was installed. However, a district court's factual findings should not be reversed merely because the evidence may be viewed differently. *Rogers v. Moore*, 603 N.W.2d 650, 656 (Minn. 1999). "Rather, the findings must be manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." *Id.* (quotation omitted).

The court's finding that the condition of the flooring did not violate regulatory requirements is also supported by the record and not clearly erroneous. Schmidt testified that the current condition of the flooring at the facility satisfied the license conditions issued by Anoka County for operating a solid waste transfer facility. There was no contrary testimony indicating that the flooring violated any government regulations. HWS did not violate the lease by failing to make flooring repairs.

4.

Finally, LERE argues that HWS violated section 6.2 of the lease by failing to pay additional rent for roof repairs made by LERE. The district court concluded that HWS did not breach the lease agreement because LERE did not prove that roof damage

occurred after the lease was entered into. The court also determined and that HWS cured any possible breach by paying the additional rent demanded by LERE.

As discussed above, HWS was not required to repair preexisting conditions beyond those specifically enumerated in section 6.1. Repairing preexisting roofing damage is not listed in section 6.1. The district court's factual finding that roof damage pre-dated the lease is supported by the record and is not clearly erroneous. Ed Haythorn, Director of Operations for HWS, testified that the roof repairs addressed only conditions that existed at the time the parties entered into the lease. No evidence was presented by LERE indicating that additional damage occurred after the lease began. HWS did not violate the lease agreement by failing to pay additional rent for roof repairs. Because we conclude that HWS was not in violation of the lease agreement, it is unnecessary to reach the alternative rationale of the district court or the related issues that LERE raises.

Affirmed.