STATE OF MINNESOTA
IN COURT OF APPEALS
A07-577

Woodlake-VEF IV, LLC,
Respondent,

vs.

Cooperative Agency, Inc.,
f/k/a Gramercy Corporation,
Appellant.

Filed March 25, 2008
Affirmed
Hudson, Judge

Hennepin County District Court
File No. 27-CV-06-5735

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Considered and decided by Hudson, Presiding Judge; Worke, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

HUDSON, Judge

Appellant argues that genuine issues of material fact exist regarding whether respondent used its "best efforts" to relet commercial property after appellant abandoned the space and that the district court erred by granting summary judgment in favor of respondent. Because we conclude that there are no genuine issues of material fact and that the district court did not err by granting summary judgment in favor of respondent, we affirm.

FACTS

In August 2001, appellant Cooperative Agency, Inc., formerly known as Gramercy Corporation (Cooperative), entered into a three-year lease agreement with Richfield State Agency, Inc. for commercial space in Richfield. The current owner of the space is respondent Woodlake-VEF IV, LLC. The parties later executed an amendment to the lease agreement, which, among other things, increased the lease term from three to five years. The lease agreement reads, in relevant portion:

> Landlord shall use its best efforts to relet the Premises or any part thereof for such rent and upon such terms as Landlord, in its reasonable discretion, shall determine (including the right to relet the Premises for a greater or lesser term than that remaining under this Lease, the right to relet the Premises as part of a larger area, and the right to change the character or use made of the Premises) and Landlord shall not be required to accept any tenant offered by Tenant or observe any instructions given by Tenant about such reletting.

In March 2006, respondent filed an unlawful-detainer complaint in Hennepin County District Court alleging breach of contract and anticipatory breach of contract

because appellant had failed to pay rent. Respondent sought approximately $78,000 in damages.

Respondent moved for summary judgment in April 2006. In support of its motion, respondent submitted the affidavit of Rob Loftus (Loftus), a property manager at United Properties, an agent for respondent. In the affidavit, Loftus described what respondent and its agents had done in an effort to relet the property, including allowing appellants to install a door-length "Space for Sublet" sign on the door to the premises; speaking with Jan Susee (Susee), appellant's counsel, regarding a possible subtenant; listing the premises on the MNCAR Exchange, the Minnesota Commercial Association of Realtor's commercial property database, a commercial real-estate listing service; engaging in extensive discussions with several prospective tenants, including Salon Sa Bel and Carrousel Travel American Express (Carrousel); and eventually replacing the door-length sign with a "more tasteful" sign.

In opposition to the summary-judgment motion, appellant submitted affidavits from Susee and Roger Schnobrich (Schnobrich), appellant's current president and sole shareholder. Susee stated that he believed respondent had displayed "a total lack of cooperation to sublease the space" and that it "did not use its best efforts to relet this space as required under the Lease Agreement." Schnobrich's affidavit stated that respondent "has not used its best efforts to re-let the premises as required under the Lease Agreement" because respondent removed the large sign and replaced it with a smaller sign, did not cooperate in appellant's efforts to lease its parking spaces to other tenants,

did not cooperate with appellant's efforts to relet the premises, and refused appellant's offer to subsidize the rent of potential tenants.

In August 2006, the district court issued an order denying respondent's motion for summary judgment because it concluded that genuine issues of material fact remained regarding whether respondent used its best efforts to relet the property.

In October 2006, citing new evidence it had uncovered since the summary-judgment ruling, respondent sent a letter to the district court requesting reconsideration of its decision under Minn. R. Gen. Pract. 115.11 (permitting motions to reconsider upon permission of the district court and upon "a showing of compelling circumstances"). In November 2006, respondent formally moved for reconsideration of the decision denying summary judgment.

In support of its motion, respondent submitted the affidavits of Rudolfo Gomez (Gomez), the owner and president of Salon Sa Bel, and Neal Kramer (Kramer), the president of Carrousel. Gomez stated that in 2005 he had discussed with Susee the possibility of subletting the space. Gomez explained that Susee instructed him to speak with Dan Wicker (Wicker) and Loftus about the space. Gomez stated that he had "[q]uite a few" discussions with Wicker and Loftus regarding leasing the space. The contacts took place over about a month and included touring the space on multiple occasions. Gomez was given plans of the space as well as a copy of a lease. Gomez stated that Salon Sa Bel did not lease the space because it was too expensive for Salon Sa Bel's budget and it "wasn't a financially viable situation." Gomez also stated that he felt respondent had done "everything that I requested" and that respondent had used its best

efforts to sublease the space. Gomez testified that Susee, on behalf of appellant, had offered to subsidize 50% of Salon Sa Bel's first year of rent if Salon Sa Bel chose to lease the property. Gomez explained that the proposal sounded great "until I found out the bottom line of the rent," at which point he realized it was still too expensive.

Kramer testified that, as president of Carrousel, he had discussions in 2005 with Wicker about leasing the space previously occupied by appellant. Kramer stated that he had toured the property with Wicker but that Carrousel decided not to lease the property because it was too expensive and was not large enough. Kramer also stated that "Carrousel's decision not to sublease the Lease Property was not a result of any failure by Wicker or United Properties to follow up with Carrousel's interest in subleasing the Leased Premises."

In a supplemental affidavit submitted by appellant to the district court in December 2006, Schnobrich stated that "it wasn't that [respondent] didn't talk to [the potential tenants], it's just that [respondent] never got back to us . . . to sit down [with us] and say what can we do to make this thing happen?" When asked what provision of the lease required respondent to cooperate with appellant to relet the space, Schnobrich replied, "[w]hen it says it will use its best efforts and reasonable discretion, it seems to me it is broader than merely stating that we will just release for the existing period" and that "there is an obligation there to be reasonable, and being reasonable might mean a cooperation or a participation with the tenant." Schnobrich also admitted that he could not point to a specific provision of the lease that stated that replacement of the large, door-sized "Space for Sublet" sign with a smaller sign violated the terms of the lease.

In January 2007, the district court granted respondent's motion for reconsideration and granted summary judgment in respondent's favor. The district court stated that "[a]t the time the Court originally decided the Motion for Summary Judgment, it was unclear to the Court whether [respondent] did use its best efforts to relet the Leased Premises," but that summary judgment was appropriate "[i]n light of new developments." The district court explained that appellant "no longer has put forth a factual dispute as to [respondent's] best efforts to relet the Leased Premises" and that it had "failed to present specific facts indicating the existence of a genuine issue of material fact." The district court concluded that appellant was responsible for approximately $83,500 in damages, legal fees, and costs. This appeal follows.

D E C I S I O N

On an appeal from summary judgment, this court asks whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). This court views the evidence in the light most favorable to the party against whom judgment was granted. *Id.*

No genuine issue of material fact exists "when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case

to permit reasonable persons to draw different conclusions." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). And no genuine issue for trial exists "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *Id*. at 69 (alteration in original) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986)). "A party need not show *substantial evidence* to withstand summary judgment. Instead, summary judgment is inappropriate if the nonmoving party has the burden of proof on an issue and presents *sufficient evidence* to permit reasonable persons to draw different conclusions." *Schroeder v. St. Louis County*, 708 N.W.2d 497, 507 (Minn. 2006) (emphasis in original).

The construction and effect of a contract is a question of law unless the contract terms are ambiguous. *Denelsbeck v. Wells Fargo & Co.*, 666 N.W.2d 339, 346 (Minn. 2003). If the contract is ambiguous, its interpretation is a question of fact for a jury. *Id.* "A contract is ambiguous if, based upon its language alone, it is reasonably susceptible of more than one interpretation." *Id.* (quotation omitted). "Absent ambiguity, the terms of a contract will be given their plain and ordinary meaning and will not be considered ambiguous solely because the parties dispute the proper interpretation of the terms." *Knudsen v. Transp. Leasing/Contract, Inc.*, 672 N.W.2d 221, 223 (Minn. App. 2003), *review denied* (Minn. Feb. 25, 2004). "[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." *Id*.

The lease does not define the term "best efforts," but neither party argues that the terms of the lease are ambiguous. Appellant argues that a question of fact exists

regarding whether respondent used its "best efforts" because it failed to include appellant in negotiations with potential tenants, failed to promote appellant's offer to subsidize a new tenant's rent, and removed a large "Space for Sublet" sign on the premises and replaced it with a smaller one. We disagree.

The language of the lease does require that respondent use its "best efforts" to relet the property, but that language is modified by the language providing that respondent was not required to "accept any tenant offered by Tenant" or "observe any instructions given by Tenant about such reletting." And appellant does not point to any evidence showing that respondent failed to use "best efforts" to relet the premises or that such "best efforts" required cooperating with appellant's wishes regarding the method with which it would attempt to find new tenants.

Furthermore, appellant did not present any evidence showing that respondent's failure to abide by appellant's wishes prevented potential tenants from renting the space or made reletting the property more difficult. The affidavit of Gomez, the owner of Salon Sa Bel, shows that he was aware of appellant's offer to subsidize the rent but that the space was still too expensive.

We conclude that appellant has failed to show that there are genuine issues of material fact regarding whether respondent used its "best efforts" under the contract and that the district court did not err by granting summary judgment in favor of respondent.

Affirmed.