STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0844

1975 Robert Street Partners,
Respondent,

vs.

SR Shingle Creek LLLP,
d/b/a Coyote Grille, et al.,
Appellants,

Nicholas Grammas,
Defendant.

Filed May 13, 2008
Affirmed
Hudson, Judge

Hennepin County District Court
File No. 27-CV-06-11168

James A. Wellner, Wellner Law, PLLC, 4687 Clark Avenue, White Bear Lake, Minnesota 55110 (for appellants)

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Susanne M. Glasser, Aafedt, Forde, Gray & Monson, PA, 150 South Fifth Street, Suite 3100, Minneapolis, Minnesota 55402 (for respondent)

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

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

HUDSON, Judge

Appellants challenge the district court's summary judgment in this lease dispute, arguing that an agreement by which they assumed obligations under a preexisting lease was voidable for mutual mistake because respondent's purchase of the property by warranty deed without an express assignment of lessor's rights did not transfer the right to enforce lease covenants against appellants. Appellants also argue that the lease was terminated when an assignee-tenant rejected the lease in bankruptcy and that material factual issues existed relating to whether damages in the form of unpaid rent could have been avoided. Because we conclude that the rejection in bankruptcy operated as a breach, rather than a termination, of the lease, and that respondent was entitled to enforce the lease covenants against appellants, we affirm summary judgment on that issue. We also affirm summary judgment on proof of mitigation of damages because appellants failed to present sufficient evidence to show the existence of a genuine issue of material fact on that issue.

FACTS

Respondent 1975 Robert Street Partners sued appellants GBM of Brooklyn Center Limited Partnership (GBM) and SR Shingle Creek LLLP (SR) in district court, alleging

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

breach of a 1991 commercial lease (1991 lease) and a 2004 lease-assumption agreement (2004 agreement), as well as default on a 2004 promissory note. Respondent also sued appellant John P. Boosalis and defendant Nicholas Grammas, who is no longer a party to this action, on their individual guarantees of the 1991 lease, the 2004 agreement, and the note.

In 1991, SAH Partnership, respondent's predecessor-in-title, leased commercial property located at 2101 Freeway Boulevard in Brooklyn Center to GBM for a 20-year term. The lease provided that GBM had the right to assign or sublet the property, subject to certain conditions, but that "such assignment or sublease does not release Lessee or any of the Guarantors of this Lease from any of their obligations under this Lease or any such guarantee." The lease also provided that it "shall bind and inure to the benefit of Lessor and Lessee . . . and to their respective heirs, executors, administrators, and/or assigns and successors." Appellant Boosalis and defendant Grammas, as individuals, personally guaranteed GBM's obligations under the 1991 lease.

In 1993, GBM assigned its lessee's interest under the 1991 lease to Chi-Chi's Midwest, Inc. and Chi-Chi's, Inc. (collectively Chi-Chi's). Chi-Chi's operated a restaurant on the property for ten years, until it filed for bankruptcy protection under Chapter 11 of the United States Bankruptcy Code. In October 2003, the bankruptcy court approved Chi-Chi's rejection in bankruptcy of the 1991 lease.

SAH sold the property by warranty deed to respondent in 2001. The warranty deed contained no language referring to the lease, although the property's certificate of title memorialized the 1991 lease and the assignment of the lessee's interest to Chi-Chi's.

Respondent acknowledges that it did not execute a document formally assuming the lessor's rights and obligations under the 1991 lease.

After Chi-Chi's lease rejection, respondent informed GBM, Boosalis, and Grammas that GBM was obligated to pay rent for the remainder of the lease term and that the individual guarantees remained in effect. On this understanding, GBM and SR, a partnership formed by Boosalis and Grammas as a substitute tenant for the property, entered into an assignment-and-assumption agreement with respondent in April 2004. The 2004 agreement provided that GBM assigned its interest in the 1991 lease to SR, and SR agreed to perform all of the lessee's duties and obligations under the 1991 lease, as amended by the 2004 agreement. Boosalis and Grammas personally guaranteed, and assumed joint and several liability for, the lessee's obligations under the 2004 agreement. The 2004 agreement acknowledged that a default existed under the 1991 lease and provided that in the event of a conflict between the 1991-lease terms and the 2004 agreement, the 2004 agreement would control.

Pursuant to the 2004 agreement, SR paid overdue property taxes owed by Chi-Chi's and incurred expenses to bring the property into compliance with local ordinances and federal health and safety standards. GBM also executed a promissory note for the payment of past-due rent and attorney fees owed by Chi-Chi's. Boosalis and Grammas personally guaranteed the note.

Beginning in August 2004, appellants failed to pay rent as it became due. In January 2005, respondent notified appellants of a default based on failure to pay rent, to pay for utilities and certain improvements, and to pay installments on the note.

Respondent paid to satisfy a mechanic's-lien judgment imposed on the property and to redeem it from foreclosure. Respondent commenced an eviction action and reentered the property based on a writ of recovery in April 2006.

Based on appellants' belief that the 2004 agreement allowed them to mitigate the loss of future rent for the property, appellants attempted to locate potential new tenants. In May 2006, respondent requested that appellants cease their efforts to locate a new tenant and allow respondent to arrange to relet the property.

In April 2006, respondent brought this action to recover the discounted present value of rent due, reimbursement for payments made as a result of the mechanic's-lien foreclosure, nonpayment of the promissory note, and attorney fees and costs. Appellants asserted, among other things, that Chi-Chi's rejection of the 1991 lease in bankruptcy terminated the lease and that the 2004 agreement and promissory note were voidable because they were based on the mutually mistaken belief that the 1991 lease still bound the parties. Appellants also asserted a counterclaim alleging that, should the 2004 agreement be given effect, it gave appellants the right to attempt to mitigate damages, which was improperly denied by respondent. Respondent then moved for summary judgment.

The district court granted summary judgment to respondent, concluding that (1) when the property was conveyed by warranty deed, respondent obtained all interest in the property, including the right to enforce the 1991 lease, which bound the parties; (2) the parties negotiated a lease term that created liability for future rents even after a default under the lease, and respondent had no obligation to mitigate damages; and

(3) appellants' counterclaim that they were not afforded a reasonable time to mitigate damages was without merit. The district court ordered judgment in favor of respondent for $538,031.41. This appeal follows.

D E C I S I O N

On appeal from summary judgment, this court considers 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). A reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). But a party opposing summary judgment must show the existence of specific, admissible facts giving rise to a factual issue. *Nicollet Restoration, Inc. v. City of St. Paul*, 533 N.W.2d 845, 848 (Minn. 1995). When no genuine issues of material fact exist, this court reviews the district court's decision de novo to determine whether it erred in applying the law. *In re Collier*, 726 N.W.2d 799, 803 (Minn. 2007).

I

Appellants challenge the district court's grant of summary judgment to respondent, arguing that the 2001 warranty deed, by which respondent took title to the property, did not expressly assign the lessor's interest under the 1991 lease. Appellants reason that absent an assignment, respondent had no authority to enforce the personal covenants of the 1991 lease against appellants, and the 2004 agreement should be voided because it depended on the parties' mutual mistake that the 1991 lease still bound the

parties. A mutual mistake of fact that provides the basis for a contract may allow the parties to void the contract. *Winter v. Skoglund*, 404 N.W.2d 786, 793 (Minn. 1987).

The district court upheld the 2004 agreement concluding that the 1991 lease was enforceable by respondent against appellants. The court quoted language of Minn. Stat. § 507.07 (2006), which describes the nature of the interest conveyed and the covenants contained in a warranty deed, and concluded that "when the [p]remises was conveyed by a warranty deed, [respondent] became the owner in fee simple and obtained all interests therein." Although Minn. Stat. § 507.07, which contains only a form with suggested terminology for a warranty deed, is not dispositive of this issue, we agree with the district court's conclusion.

Effect of Bankruptcy on Lease

Appellants contend that Chi-Chi's rejection of the 1991 lease in bankruptcy terminated the lease. Rejection is the decision of a debtor not to assume the obligations of a lease. *In re Austin Dev. Co.*, 19 F.3d 1077, 1082 (5th Cir. 1994). "The rejection of an executory contract or unexpired lease during the bankruptcy case generally gives rise to a pre-petition claim for breach of contract or lease as if such contract or lease had been breached immediately before the date of filing of the petition." Eileen M. Roberts, *Real Estate Law*, 25 Minnesota Practice, *Real Estate in Bankruptcy*, § 7.16, at 353 (2007) (citing 11 U.S.C.A. § 365(g)(1) (2000); *In re Arctic Enters., Inc.*, 15 B.R. 512, 513 (Bankr. D. Minn. 1981)). Once the lease is deemed breached under 11 U.S.C.A. § 365(g), state law governs the parties' remedies. *Id*. (citing *In re Audra-John Corp.*, 140 B.R. 752, 757 (Bankr. D. Minn. 1992)). Therefore, Chi-Chi's rejection of the lease

operated as a breach, rather than a termination, of the 1991 lease, and we examine state law to determine the effect of the breach on the parties' rights.

Under Minnesota law, "where the lessee relets for his whole term, the instrument, whatever its form, operates as an assignment of the original lease . . . and gives the original lessor the right to enforce against the sublessee all the covenants which run with the land including the covenant to pay rent." *Davidson v. Minn. Loan & Trust Co.*, 158 Minn. 411, 415–16, 197 N.W. 833, 834–35 (1924). But "the original lessee still remains bound by his contract and liable to the original lessor for any default therein." *Id.* at 416, 197 N.W. at 835. The terms of the 1991 lease also expressly state that an assignment of the lessee's interest in the lease "does not release Lessee or any of the Guarantors . . . from any of their obligations under this Lease or any such guarantee." Thus, when a default occurred by way of Chi-Chi's rejection of the lease, GBM remained liable for the breach, with the individual guarantors liable upon GBM's default.

Liability Under 1991 Lease

Appellants argue that respondent is precluded from enforcing the covenants of the 1991 lease against them because there was no express assignment of the lessor's interest when respondent purchased the property by warranty deed. The Minnesota Supreme Court has held that

> [a] conveyance of the reversion brings the grantee [of the reversion] in privity with the lessee, puts him in the place of the original lessor, subjects him to the burdens of such covenants of the lessor as run with the land, and entitles him to the benefits of the covenants of the lessee. . . . The rights and liabilities existing between the grantee and the lessee are the same as those that originally existed between the grantor

> and the lessee. In short he becomes the landlord and the original lessor ceases to be such. The tenant holds of the new landlord upon the same terms as he held of the old.

Glidden v. Second Ave. Inv. Co., 125 Minn. 471, 473, 147 N.W. 658, 659 (1914) (internal citations omitted); *see also Whitney v. Leighton*, 225 Minn. 1, 11, 30 N.W.2d 329, 334 (1947) (holding that assignee of a landlord's interest in a lease had a duty to pay property taxes based on his privity of estate with the owners of the fee); 2 Richard R. Powell, *Powell on Real Property*, § 17.04[3][a] at 17–56 (2000) (stating that "[t]ransferees of the landlord's reversion are generally subject to the terms of the lease as it existed between the original landlord and the tenant").

Appellants argue that *Glidden* is distinguishable because, in that case, the grantee of the property expressly assumed the obligations of the lease, so that privity of contract, not just privity of estate, existed between the new landlord and the existing tenant. *See Davidson*, 158 Minn. at 415, 197 N.W. at 834 (stating that a lease is both a present conveyance and an executory contract, and it creates both privity of estate and privity of contract between the lessor and lessee). Appellants acknowledge that SR may have a duty to pay rent to respondent during the time that it occupied the premises after Chi-Chi's default, based on SR's privity of estate with respondent at that time. But they argue that, unlike in *Glidden*, respondent did not expressly assume the covenants of the 1991 lease, so that appellants are not liable to respondent for a breach of those covenants, and the 2004 agreement is thus voidable because it is based on the parties' mutual mistake.

To determine whether appellants had a contractual liability to respondent arising from the 1991 lease, we examine the terms of the lease. "A lease is a contract which

should be construed according to ordinary rules of interpretation." *Amoco Oil Co. v. Jones*, 467 N.W.2d 357, 360 (Minn. App. 1991). The construction and effect of an unambiguous contract is a question of law. *Trondson v. Janikula*, 458 N.W.2d 679, 681 (Minn. 1990).

This court "interpret[s] the lease according to its plain language to ascertain the parties' intent." *Amoco Oil*, 467 N.W.2d at 360; *see also Kirk Corp. v. First Am. Title Co.*, 270 Cal. Rptr. 24, 39 (1990) (stating that "[i]n determining whether a grantor retains its rights under a lease on transfer of the property, the crucial question is what the parties intended.").

The 1991 lease provides that "[e]ach provision herein shall bind and inure to the benefit of Lessor and Lessee . . . and to their respective heirs, executors, administrators, and/or assigns and successors." Further, the individual guarantees of the lease state that they are "binding upon and shall inure to the benefit of the Landlord, its successors and assigns." Similar language has been construed to uphold lease covenants in favor of a lessor's successor-in-title. *See, e.g.*, *Plastone Plastic Co. v. Whitman-Webb Realty Co.*, 176 So. 2d 27, 28–29 (Ala. 1965) (holding that when lease contained provision that it was binding on "successors, heirs, [or] assigns," lease clause exculpating lessor from liability for damages arising from fire applied to successor-in-title of lessor). We also note that the 1991 lease was properly memorialized on the certificate of title to the property at the time respondents took title to the property. Therefore, we conclude that the parties intended that the lessor's rights and obligations would continue in favor of the grantee of the property, even absent an express assignment of those rights and obligations.

Appellants cite *Pelser v. Gingold*, 214 Minn. 281, 287, 8 N.W.2d 36, 40 (1943), for the proposition that because the obligations under the lease did not run with the land, the right to enforce those obligations did not transfer to respondent when respondent took title to the property. In *Pelser*, the supreme court held that a contract vendor's obligation to pay the mortgage of a previous owner did not run with the land, so that when the vendor conveyed title to the land subject to that mortgage, but without an express assumption of the mortgage by the new owner, the new owner was not personally liable on the mortgage. *Id*. at 287–88, 8 N.W.2d at 40–41. But *Pelser* is distinguishable because it deals with the personal obligation to pay the debt of another and, unlike this case, did not involve a lease in which the parties expressly bound their successors to the covenants of the lease.

We therefore also conclude that the 2004 agreement was not based on mutual mistake and that it governs the parties' rights. Accordingly, the district court did not err in granting summary judgment holding appellants liable for their uncontested default.

II

Appellants argue that the district court erred by granting summary judgment concluding that respondent owed no duty to mitigate damages under the 2004 agreement and dismissing with prejudice appellants' counterclaim, which alleged that they had not been allowed sufficient time to mitigate damages by obtaining a replacement tenant.

Minnesota courts give effect to a lease provision that gives a lessor the right to recover rent through the end of the lease term, after a lessee has defaulted. *Galbraith v. Wood*, 124 Minn. 210, 216, 144 N.W. 945, 948 (1914); *see also Control Data Corp. v.*

Metro Office Parks Co., 296 Minn. 302, 306, 208 N.W.2d 738, 740–41 (1973) (stating that generally, a commercial landlord has no obligation to mitigate damages when a tenant abandons leased property). By analogy, if a tenant vacates property and the lease requires rent payment through the end of the term, the tenant is not entitled to offset against rent due any amount saved by the landlord because the leased space is no longer in use. *Control Data Corp.*, 296 Minn. at 306, 208 N.W.2d at 741.

The district court stated that "[t]he parties . . . do have a term in their contract which holds [appellants] liable for rents due through August 2011" and, based on *Galbraith*, concluded that respondent had no duty to mitigate damages. The 1991 lease provided that if the lessee defaulted and failed to cure, the lessor had the right to terminate the lease and hold the lessee liable for "all loss of rents and other damage which Lessor may incur by reason of such termination during the residue of the Lease Term."

But the 2004 agreement, which the parties agreed would control to the extent it conflicted with the 1991 lease, deleted the earlier provision on damages and substituted new provisions. The new provisions state that if the lessee defaults, damages to the lessor include

> 20.3.2 Rent Prior to Award. The worth at the time of the award of the amount by which the unpaid Rent that would have been earned between the time of the termination and the time of the award exceeds *the amount of unpaid Rent that Lessee proves could reasonably have been avoided*; plus
>
> 20.3.3 Rent After Award. The worth at the time of the award of the amount by which the unpaid Rent for the balance of the

> term after the time of the exceeds *the amount of the unpaid Rent that Lessee proves could be reasonably avoided*[.]

Thus, by its plain language, the 2004 agreement states that, for the purpose of calculating respondent's damages, the parties intended to provide appellants with an opportunity to show "the amount of the [r]ent that . . . could reasonably be avoided," both prior to and after the damages award. *See Amoco Oil*, 467 N.W.2d at 360 (interpreting lease according to plain meaning to determine parties' intent).

Nonetheless, we conclude that the district court properly granted summary judgment rejecting appellant's counterclaim that they were not afforded a reasonable period of time in which to mitigate damages. Appellants stopped paying rent on the property in August 2004 and were notified of their default in January 2005. In May 2006, more than a year later, respondent requested that appellants cease their efforts to relet the property and allow respondent to take over responsibility for finding a new tenant. Thus, appellants were afforded a reasonable length of time to mitigate damages, given the nature of the leased premises. The record also shows that appellants submitted a draft lease and an alternate draft assignment and assumption of lease relating to two different prospective tenants for the property. But these proposals do not contain sufficient information, such as verified financial statements, to show with specificity the reasonableness of the proposed tenancies. To survive summary judgment, the nonmoving party has the burden to show specific facts raising an issue for trial. *Nicollet Restoration*, 533 N.W.2d at 848. We agree with the district court that, on this record, the

evidence submitted is insufficient to raise a genuine issue of material fact on the issue of mitigation of damages.

Affirmed.