COURT OF APPEALS DECISION DATED AND RELEASED

August 14, 1996

NOTICE

Nos. 96-0592
96-0593
96-0594
96-0595

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

No. 96-0592

BROOKHILL CAPITAL RESOURCES, INC., as general partner and on behalf of Westgate Mall Properties, a New Jersey limited partnership,

Plaintiff-Appellant,

v.

SPIEGELHOFF FABRICS, INC.,

Defendant-Respondent.

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No. 96-0593

BROOKHILL CAPITAL RESOURCES, INC., as general partner and on behalf of Westgate Mall Properties, a New Jersey limited partnership,

Plaintiff-Appellant,

v.

JALENSKY SPORTS CENTER, INC.,

Defendant-Respondent.

- -

No. 96-0594

BROOKHILL CAPITAL RESOURCES, INC., as general partner and on behalf of Westgate Mall Properties, a New Jersey limited partnership,

Plaintiff-Appellant,

v.

RANDALL STORES, INC., a foreign corporation,

Defendant-Respondent.

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No. 96-0595

BROOKHILL CAPITAL RESOURCES, INC., as general partner and on behalf of Westgate Mall Properties, a New Jersey limited partnership,

Plaintiff-Appellant,

v.

DAVID A. CARLSON, d/b/a SUE'S HALLMARK SHOP,

Defendant-Respondent.

APPEALS from judgments of the circuit court for Racine County: DENNIS J. FLYNN, Judge. *Reversed and cause remanded*.

SNYDER, J. Brookhill Capital Resources, Inc. appeals from a summary judgment disposing of its claim to past common area maintenance (CAM) charges from four Westgate Mall tenants. On appeal, Brookhill contends that summary judgment should not have been granted because there are factual issues regarding whether the stated time for performance was essential to the contract. Brookhill seeks reversal of the summary judgment. We conclude that there are issues of material fact in dispute and summary judgment was improper.

In January 1995, Brookhill filed a complaint against four tenants: Spiegelhoff Fabrics, Inc.; Jalensky Sports Center, Inc.; Randall Stores, Inc.; and David A. Carlson, d/b/a Sue's Hallmark Shop, for unpaid CAM expenses for 1991, 1992, 1993 and 1994. Brookhill has separate, yet similar, leases with all four tenants, and because the four claims were similar, the cases were consolidated.[1]

Under the leases, the tenants must make prorated monthly CAM payments based upon the preceding year's actual CAM expenditures. It is undisputed that the tenants have paid these monthly installments.

[1] The cases were consolidated by order of this court dated June 25, 1996.

Additionally, all four leases include a provision that requires Brookhill to submit to the tenants a reasonably detailed account reconciling these payments with the actual expenses incurred. The leases for Spiegelhoff and Jalensky expressly state that the preceding year's actual CAM costs should be submitted within ninety days from the end of the lease year. Randall's lease states that within fifteen days from the end of each month Brookhill should provide that month's actual CAM costs. Carlson's lease does not enunciate any specific time. None of the leases contain a "time is of the essence" clause.

Brookhill's accounting department underwent reorganization during 1991 and 1992, and consequently, Brookhill did not provide the tenants with the respective CAM charges until November and December 1993. Also, the actual CAM charges for 1993 were submitted in June 1994 and for 1994 in March 1995. It is undisputed that the tenants have not made these payments.

In response to Brookhill's claim, the tenants contend that they are not obligated to pay these CAM charges because they were not supplied with an accounting within the time stated by the lease provisions. Further, they contend that the CAM charges were inflated because Brookhill wrongly included the cost of repairing and resurfacing the mall parking lot which occurred in 1992 and 1994. Accordingly, the tenants moved for summary judgment dismissal.

The trial court granted partial summary judgment to Jalensky, Spiegelhoff and Carlson dismissing the CAM cost claims for 1991, 1992 and 1993. Randall was granted judgment for 1991 through 1994. The basis of the dismissal was that the charges were not timely submitted. This was a result of the trial court's finding that time was of the essence. For the three leases stating a specific time for submission, the trial court employed the tenet of contract law that unambiguous language in a contract must be enforced as written. For Carlson's lease, with no specified time for performance, the trial court used a reasonableness standard and determined that the submissions were not made within a reasonable time. Finally, the trial court interpreted the definition of CAM costs provided in the leases and determined that resurfacing the parking lot did not constitute a CAM expense. With regard to the remaining CAM costs for 1994, the trial court concluded that these charges were in dispute and refused summary judgment on the matter. Brookhill's appeal followed.[2]

We apply the summary judgment statute, § 802.08(2), STATS., in the same manner as the trial court. ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). Because that methodology is well known, it need not be repeated here. ***Paape v. Northern Assurance Co.***, 142 Wis.2d 45, 50, 416 N.W.2d 665, 667 (Ct. App. 1987). Summary judgment is a drastic remedy and should not be granted unless the law that resolves the issue is clear.

[2] Following the court's order granting partial summary judgment, the parties reached a settlement agreement on all remaining issues. The court then issued a final judgment, which Brookhill appeals.

Lecus v. American Mut. Ins. Co., 81 Wis.2d 183, 189, 260 N.W.2d 241, 243 (1977).

Where complex issues are presented to a court on summary judgment, they often cannot be decided on the basis of affidavits and depositions. *See* ***Peters v. Holiday Inns, Inc.***, 89 Wis.2d 115, 129, 278 N.W.2d 208, 215 (1979). If the presented materials are subject to conflicting interpretations or reasonable people might differ as to their significance, summary judgment is inappropriate. ***Grams v. Boss***, 97 Wis.2d 332, 339, 294 N.W.2d 473, 477 (1980).

We first address the tenants' contention that the leases clearly state the time within which Brookhill is to submit the annual CAM charges. They argue that the timely submission of these costs is a condition precedent to fulfilling their promise to make the requested payments. They also maintain that the time stated in the lease was purposefully included to afford the tenants the opportunity to incorporate into the price of their merchandise any excess costs associated with maintaining common areas. Thus, the tenants contend that the time provision was essential to the lease and Brookhill's failure to timely perform constitutes a breach of contract.

In opposition to the summary judgment motion, Brookhill argues that because there is no language to the contrary in the leases, time is not of the essence. Also, Brookhill offered undisputed affidavits showing that the tenants

had accepted late CAM cost submissions in the past. Brookhill contends that this willingness to accept late submissions constitutes an implied waiver or contract modification.

The trial court found as a matter of law that the leases for Jalensky, Spiegelhoff and Carlson unambiguously state the time in which Brookhill was to submit the CAM costs. For example, Spiegelhoff's lease states: "Within ninety (90) days after the end of each Lease Year ... Landlord shall furnish Tenant a statement in reasonable detail of Landlord's actual Common Area Costs ...." The court then looked to accepted law that "unambiguous contractual language must be enforced as it is written" in granting summary judgment for the tenants. ***State v. Windom***, 169 Wis.2d 341, 348, 485 N.W.2d 832, 835 (Ct. App. 1992).

We agree with the trial court that the Spiegelhoff, Jalensky and Carlson leases contain a clause which unambiguously states a time for performance. However, Wisconsin case law recognizes a distinction between a breach of a substantive promise and a breach of promise as to the time of performance. Courts "have treated stipulations as to time as subsidiary and of less importance than the thing promised ...." ***Zuelke v. Gergo***, 258 Wis. 267, 270-71, 45 N.W.2d 690, 692 (1951) (quoted source omitted). Furthermore, a nonmaterial breach of contract does not excuse performance by the nonbreaching party. *See* ***Entzminger v. Ford Motor Co.***, 47 Wis.2d 751, 755, 177 N.W.2d 899, 901-02 (1970). Unless the time for performance is of the essence,

contractual time provisions are not generally material. ***Huntoon v. Capozza***, 57 Wis.2d 447, 452-53, 204 N.W.2d 649, 652 (1973). Whether time is of the essence in a contract is a factual question. ***Employers Ins. v. Jackson***, 190 Wis.2d 597, 616, 527 N.W.2d 681, 688 (1995).

Commonly, time is not of the essence unless the contract expressly makes it so or the parties' conduct clearly indicates that intent. ***Stork v. Felper***, 85 Wis.2d 406, 411, 270 N.W.2d 586, 589 (Ct. App. 1978). Moreover, simply including the time for performance in a contract does not make time of the essence. ***Buntrock v. Hoffman***, 178 Wis. 5, 13, 189 N.W. 572, 575 (1922). There must also be a provision specifying the effect of nonperformance within the designated time. ***Id.***[3]

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[3] WISCONSIN J I—CIVIL 3048 provides further support:

> The importance of time in connection with the performance of a contract depends upon the nature of the contract, the terms thereof, and the circumstances appearing from the conduct of the parties. Time is not to be regarded as of vital importance or as of the essence of the contract unless it is clear that the parties intended to make it so by their conduct or by the terms on which they have agreed.
>
> Time is not to be regarded as of the essence of the contract merely because a definite time for performance is stated therein, in the absence of any further provision regarding the effect of nonperformance at the time stated. Where there is no provision as to the time for performance, the law will imply a reasonable time which means a somewhat more protracted time than directly, forthwith, or as soon as possible.
>
> If you determine that performance at the exact time agreed upon was intended to be of vital importance to the parties, you may find that time was of the essence so that failure of the party to perform on time may

The leases do not state that time is of the essence, nor do they provide a consequence for failure to timely perform. Whether Brookhill's failure to submit the CAM costs in accordance with the leases constitutes a breach of contract is a material issue of fact. Thus, concluding that the tenants are no longer obligated to pay the CAM costs because they were untimely submitted requires a finding of fact that the stated time is essential to the leases. It is this determination that precludes summary judgment disposition.

Finally, with regard to Carlson's lease, the trial court correctly noted that when no time for performance is expressly stated, a reasonable time is implied. ***Delap v. Institute of Am., Inc.***, 31 Wis.2d 507, 512, 143 N.W.2d 476, 478 (1966). However, "what constitutes a reasonable time [for performance] within the facts of a given case presents a question of fact." ***Id.*** (quoted source omitted). Since reasonableness is a question of fact, it was improperly decided on summary judgment. Consequently, this issue also should be decided by the finder of fact.

We now turn to the parking lot resurfacing costs. In granting summary judgment dismissal, the trial court determined as a matter of law that repairing and resurfacing the mall parking lot is not a CAM expense under the leases. In making this determination, the court interpreted the lease provisions detailing the items deemed to be CAM costs and principally characterized these

(..continued)

constitute a breach of contract.

costs as day-to-day or yearly upkeep expenses. The court reasoned that resurfacing the parking lot was better classified as a capital expenditure than as a maintenance expense. Consequently, the court interpreted the leases as excluding any costs associated with resurfacing the parking lot.

In order to arrive at this conclusion on summary judgment, the trial court must first find the lease language unambiguous. This is a question of law which may be answered on summary judgment. *See* ***Lamb v. Manning***, 145 Wis.2d 619, 627, 427 N.W.2d 437, 441 (Ct. App. 1988). Also, courts may interpret an unambiguous contract as a matter of law by looking to the language in the written instrument. *See* ***Gunka v. Consolidated Papers, Inc.***, 179 Wis.2d 525, 531, 508 N.W.2d 426, 428 (Ct. App. 1993).

Since the construction of a written contract raises a question of law, this court owes no deference to the trial court's interpretation. ***Kreinz v. NDII Sec. Corp.***, 138 Wis.2d 204, 216, 406 N.W.2d 164, 169 (Ct. App. 1987). When contractual language is clear and unambiguous, we construe it as it stands. ***Id.*** However, a contract that is reasonably and fairly susceptible to more than one construction is ambiguous. ***Jones v. Jenkins***, 88 Wis.2d 712, 722, 277 N.W.2d 815, 819 (1979).

All four leases contain similar sections setting out the types of expenditures in common areas for which the tenants are financially obligated. All of the leases include a broad-sweeping definition of CAM costs, combined

with a laundry list of specific expenses. For example, the relevant section of Spiegelhoff's lease states, "The Common Area Costs shall cover all costs and expenses of every kind and nature paid or incurred by Landlord ... in operating, managing, equipping, policing ... protecting, insuring, heating, cooling, lighting, ventilating, repairing, replacing and maintaining the Common Areas and Facilities ...."

From this section, one may read the language to comprise all possible costs of operating and maintaining the common areas. As the record indicates, there is no dispute that the parking lot is part of the common area. Alternatively, when combined with the leases' lists of specific expenses, this provision may be read as merely including short-term maintenance costs, as the trial court suggested. Furthermore, we note that none of the leases contain any reference to costs associated with "resurfacing" the parking lot.[4]

From our analysis, it is apparent that with regard to resurfacing the parking lot the lease language is reasonably susceptible to more than one interpretation. Therefore, we conclude that all four leases are ambiguous as to whether resurfacing the parking lot is a CAM expense.

Moreover, once a court considers that a contract is ambiguous, the court must consider the intent of the parties. ***Capital Invs., Inc. v. Whitehall***

[4] Even the provision in Carlson's lease which included in the CAM costs the "repair and replacement of paving and stripping including parking areas" is susceptible of multiple interpretations as to whether this includes a complete resurfacing of the entire parking area.

Packing Co., 91 Wis.2d 178, 190, 280 N.W.2d 254, 259 (1979). "The cornerstone of contract interpretation is to ascertain the parties' true intentions as expressed by contractual language." ***Bank of Barron v. Gieseke***, 169 Wis.2d 437, 455, 485 N.W.2d 426, 432 (Ct. App. 1992). However, the true intent of the parties is a question of fact. *See* ***Brown v. Hammermill Paper Co.***, 88 Wis.2d 224, 234, 276 N.W.2d 709, 713 (1979). We therefore conclude that summary judgment disposition is not appropriate.

In sum, we agree that three of the leases unambiguously state a specific time for Brookhill to submit an account of the actual CAM expenses. However, the tenants may not be relieved of their obligation to pay their share of the costs unless the fact finder determines that time is of the essence or, in the alternative, that the charges were not submitted within a reasonable time. Regarding the resurfacing issue, we conclude that the language in the relevant lease provisions is ambiguous since it is reasonably susceptible to more than one construction. Because Brookhill's claims present complex, disputed issues of material fact, they cannot be rightly decided on summary judgment.

By the Court. – Judgments reversed and cause remanded.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.