COURT OF APPEALS
DECISION
DATED AND RELEASED

MARCH 25, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-2503

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

DAVID KOSMO,

Plaintiff-Appellant,

v.

STATE OF WISCONSIN DEPARTMENT OF TRANSPORTATION and EAU CLAIRE AREA SCHOOL DISTRICT, a quasi-municipal corporation of the State of Wisconsin,

Defendants,

CITY OF EAU CLAIRE, a municipal corporation of the State of Wisconsin,

Defendant-Respondent.

APPEAL from a judgment of the circuit court for Eau Claire County: GREGORY A. PETERSON, Judge. *Reversed and cause remanded with directions.*

Before Cane, P.J., LaRocque and Madden, JJ.

PER CURIAM. David Kosmo appeals a summary judgment in favor of the City of Eau Claire in the sum of $9,600 representing the City's cost of razing a concrete block warehouse after it terminated Kosmo's tenancy.

The City argues that (1) the warehouse is personal property to be removed by the tenant under § 704.05(5), STATS.; (2) Kosmo is bound by judicial admissions of ownership; (3) the Department of Transportation's limited rights of acquisition under § 85.09(2), STATS., preclude it from acquiring and conveying the building through condemnation proceedings; and (4) Kosmo unlawfully "held over" entitling the City to damages. We reject these arguments, reverse the judgment and remand with directions to enter summary judgment in favor of Kosmo.

The material facts are undisputed and are derived from the pleadings and affidavits of record. Kosmo initially filed an action against the Department of Transportation, the Eau Claire School District and the City of Eau Claire, seeking a declaratory judgment that he is entitled to relocation benefits under §§ 32.19 and § 32.195, STATS., from the DOT and the school district, and claiming inverse condemnation.

Kosmo alleged that beginning in 1977, his business, a commercial warehouse, occupied real estate in Eau Claire pursuant to an indefinite term lease with a railroad company. The warehouse consisted of a building constructed by the railroad and extensions to the building by various tenants. Kosmo alleged that in 1984, the DOT exercised its power of eminent domain and acquired ownership of the property. In 1985, the DOT deeded the property to the City of Eau Claire, which leased the property to Kosmo for a period of time before terminating his tenancy. After Kosmo vacated, the City razed the building and sought compensation from Kosmo for the $9,600 it incurred razing the building.

The trial court dismissed Kosmo's claims against the DOT and the school district.[1] Kosmo stipulated to a voluntary dismissal of his claim against

[1] We affirmed the trial court's dismissal of Kosmo's action for failure to state a claim against the DOT and the school district. ***Kosmo v. DOT,*** No. 96-1174-FT unpublished slip op. (Wis. Ct. App. Nov. 19, 1996); ***Kosmo v. DOT,*** No. 96-0984-FT unpublished slip op. (Wis. Ct. App. Sept. 10, 1996).

the City. The City filed a counterclaim alleging that Kosmo was a tenant under a lease with the City for an initial term of one year, which was extended through the end of 1993. On February 2, 1993, the City notified Kosmo in writing that the lease would not be renewed after 1993 and that he would have until January 31, 1994, "to remove all personal property, including his building, from the leased premises, and that if the property were not removed by January 31, 1994, the City would have the right to remove the building at [Kosmo's] expense." The City does not dispute that Kosmo vacated the warehouse. Nonetheless, its counterclaim alleges that he failed to remove his building from the leased premises and that the City incurred $9,600 in damages in order to have it removed.

Kosmo answered the counterclaim, admitted that the City sent him notification as alleged, but denied "that said lease imposed any obligation on [Kosmo] to remove [Kosmo's] building from the leased premises." Kosmo also affirmatively alleged that the City was acting as condemnor, rather than landlord, to displace him from the real estate.

The lease described the property as follows: "Parcel No. 7-425, former Milwaukee Road Right-of-Way. The premises leased hereby shall be used solely by the Lessee for warehousing purposes." The lease further provides that the lessee shall be responsible for all maintenance and upkeep on the leased premises, payment for all taxes, utility bills and bills for all other services, and "obtain and maintain in force insurance coverage providing fire and extended coverage on all improvements on the leased premises." It does not provide for removal of the building at the end of the lease term.

In its motion for summary judgment, the City relied on § 704.05(5)(a)2, STATS., that provides if a tenant removes from the premises and leaves "personal property," the landlord may, after giving notice, dispose of the property by appropriate means. It also relied on "Chattels owned by the tenant that are left on the leased property when the tenant leaves may interfere with the landlord's full use of the leased property. He can recover from the tenant the cost of removing such chattels ...." RESTATEMENT (SECOND) OF PROPERTY § 12.3 cmt. l at 473 (1977).

The trial court granted the City summary judgment for $9,600 on its counterclaim for expenses incurred razing the commercial warehouse. It

adopted the City's position that the warehouse was personal property and that unless Kosmo removed it from the premises, the City, as landlord, was entitled to damages for the costs associated with removing it. Kosmo appeals the summary judgment.

We review a summary judgment de novo by applying the standards in § 802.08, STATS., in the same manner as the trial court. ***Brownelli v. McCaughtry,*** 182 Wis.2d 367, 372, 514 N.W.2d 48, 49 (Ct. App. 1994). Summary judgment is appropriate when material facts are undisputed and when inferences that may be reasonably drawn from the facts are not doubtful and lead only to one conclusion. ***Green Spring Farms v. Kersten,*** 136 Wis.2d 304, 314-15, 401 N.W.2d 816, 820 (1987).

1. WHETHER THE WAREHOUSE BUILDING IS PERSONALTY

Kosmo argues the trial court erroneously concluded as a matter of law that the warehouse was personal property that he had an obligation to remove under § 704.05, STATS. We agree. In ***Premonstratensian Fathers v. Badger Mut. Ins. Co.,*** 46 Wis.2d 362, 367, 175 N.W.2d 237, 239-40 (1970), our supreme court stated:

> Whether articles of personal property are fixtures, *i.e.* real estate, is determined in this state, if not generally, by the following rules or tests: (1) Actual physical annexation to the real estate; (2) application or adaption to the use or purpose to which the realty is devoted; and (3) an intention on the part of the person making the annexation to make a permanent accession to the freehold.

"Although the application of this test is normally a question of fact, it becomes a question of law when only one reasonable conclusion may be drawn from the evidence." ***DOR v. A.O. Smith Harvestore Prods.,*** 72 Wis.2d 60, 68, 240 N.W.2d 357, 360 (1976). Here, the only reasonable conclusion that may be drawn from the evidence is that the warehouse is not personal property, but rather a fixture.

The record discloses that the warehouse consisted of an old engine house owned by the Milwaukee Road and additions made by tenants up to the mid 1960s. The structures were of a concrete block construction, with concrete block walls and concrete floors. Total square footage indicated is approximately 2,794. It is undisputed that the building was annexed to the land. However, in Wisconsin, physical annexation is a factor of relative unimportance. ***Id.*** at 67-69, 240 N.W.2d at 360-61.

Adaptation refers to the relationship between the chattel and the use made of the realty to which the chattel is annexed. The record indicates that the original building was used at some point by the railroad as an engine house. Later the building and improvements were used as a warehouse. The building was adapted to the land.

Next, "[t]his court has repeatedly held that intent is the primary determinant of whether a certain piece of property has become a fixture. *The relevant intent is that of the party making the annexation.*" ***Premonstratensian Fathers,*** 46 Wis.2d at 371, 175 N.W.2d at 242 (emphasis added; footnote omitted). "This intention is 'not the actual subjective intent of the landowner making the annexation, but an objective and presumed intention of that hypothetical ordinary reasonable person, to be ascertained in the light of the nature of the article, the degree of annexation, and the appropriateness of the article to the use to which the realty is put.'" ***A.O. Smith Harvestore,*** 72 Wis.2d at 69, 240 N.W.2d at 361. Also, "where the property is placed upon a foundation particularly prepared for it, the factor of adaptation is manifest and the intent to make a permanent annexation is almost certain." ***Id.***

The record discloses the building was affixed to a concrete foundation and the walls were of concrete block. The "size, weight and cost of moving are certainly relevant to the issue of intention." ***Id.*** at 69-70, 240 N.W.2d at 361. The record shows that it cost $9,600 to raze the building. All of these factors point unequivocally to the intended permanency of the structure. The only reasonable inference to be drawn from the construction of the concrete block warehouse is that it was intended to be a permanent accession to the realty.

For that reason, the City's affidavit that it never regarded itself as the owner of the property is not probative of the intent of the annexor. Further,

any suggested implications of ownership in the lease between the City and Kosmo are not probative of the intent of the annexor.

The City argues that the tax assessor's affidavit that the warehouse was taxed as Kosmo's personal property renders the warehouse personal property. We have rejected a similar argument in ***Vivid, Inc. v. Fiedler,*** 174 Wis.2d 142, 155, 497 N.W.2d 153, 158-59 (Ct. App. 1993), *aff'd as modified,* 182 Wis.2d 71, 512 N.W.2d 771 (1994): "Taxing officials may treat fixtures as personal property in order to assess the property to the person beneficially entitled thereto." ***Id.*** The intent of the taxing official is not the intent of the person annexing the property.

Because material facts are undisputed, and the inferences lead only to the reasonable conclusion that the concrete block warehouse is not personal property, but rather a fixture under the ***Premonstratensian Fathers*** test, we conclude as a matter of law that § 704.05(5), STATS., providing for the disposition of the personalty left by a tenant has no bearing on the case before us.

Section 704.05(4), STATS., entitled "TENANT'S FIXTURES" provides that at the termination of a tenancy, "the tenant may remove any fixtures installed by the tenant if the tenant either restores the premises to their condition prior to the installation or pays to the landlord the cost of such restoration." Here, the fixtures were installed not by Kosmo, but by earlier tenants. In any event, the section does not impose any obligation on Kosmo to remove his fixtures. A landlord may not impose liability for a tenant's failure to remove fixtures absent a lease agreement to that effect. *See* ***Bence v. Spinato,*** 196 Wis.2d 398, 403, 538 N.W.2d 614, 615 (Ct. App. 1995).

2. JUDICIAL ADMISSION OF OWNERSHIP

The City argues that Kosmo is bound by a judicial admission in his claim for relocation benefits that the building was his property and therefore responsible for the expense of razing the building. We disagree. In his complaint, Kosmo stated that he acquired a property right described as "ownership of the building which the Railroad had constructed on the property" and "ownership of extensions of the original Railroad building which had been constructed on the property by previous tenants."

Ownership of fixtures does not impose any duty on Kosmo to remove them for the benefit of the City. First, no lease agreement requires the removal of fixtures. Second, although fixtures may be removable at the option of the tenant, *see* § 704.05(4), STATS., this rule is for the protection of the tenant and cannot be invoked by the landlord absent a lease agreement requiring removal. *See* ***Bence,*** 196 Wis.2d at 410-11, 538 N.W.2d at 618.

In ***Bence,*** a landlord sought damages from its former tenant for the removal of underground storage tanks and sludge tank. We stated:

> Trade fixtures ordinarily belong to the lessee and are removable by the tenant at the expiration of the lease term. ...
>
> However, if a lessee fails to remove the trade fixtures within a reasonable time after the termination of the agreement, it is presumed under common law that the tenant has abandoned them and the fixtures become part of the realty owned by the lessor.

Id. at 410, 538 N.W.2d at 617-18 (citation omitted). We upheld the trial court's denial of the landlord's claim.

Here, there is no dispute Kosmo abandoned the warehouse after the lease was terminated. The City's proofs contain numerous letters and notices to Kosmo advising him to remove his property, including buildings, at the termination of the tenancy. Kosmo vacated the premises, and did not remove the building the City later razed. We conclude that Kosmo's assertions

of ownership in the warehouse building fail to demonstrate liability for its removal after the termination of the tenancy.

Also, we are unpersuaded that Kosmo's statements in his claims for relocation benefits are judicial admissions in the sense that they are binding on the issue before us. Statements of ownership are mixed questions of fact and law. The binding effect of judicial admissions, however, "is limited to statements or admissions as to matters of fact. Statements or admissions relative to questions of law are not admissible ...." ***Fletcher v. Eagle River Mem'l Hosp.,*** 156 Wis.2d 165, 179, 456 N.W.2d 788, 795 (1990). "Moreover, they must be germane to and pertinent to the very issue for which the court wishes to make use of the admissions." ***Id.*** at 174, 456 N.W.2d at 793. We conclude that Kosmo's assertions of ownership in fixtures for the purpose of claiming relocation benefits from the DOT do not in any way bind him to remove the essentially immovable warehouse. In any event, even if Kosmo owned the building during the lease, upon termination of the lease, the building as an abandoned fixture became "part of the realty" owned by the City as landlord. ***Bence,*** 196 Wis.2d at 410, 538 N.W.2d at 618.

3. DOT'S AUTHORITY UNDER § 85.09, STATS.

Next, the City argues that according to § 85.09(4), STATS., the DOT can convey only "railroad property" it has previously acquired, defined as "all fixed property, real or personal, used in operating a railroad." Section 85.01(3), STATS. It argues that because Kosmo's warehouse was not used in operating a railroad, the DOT could not acquire it and convey it to the City.

We conclude that the issue of DOT's ownership of the tenant's fixtures has no bearing on the question before us. Under ***Bence,*** if the tenant fails to remove the fixtures within a reasonable time after the termination of his tenancy, "it is presumed under common law that the tenant has abandoned them and the fixtures become part of the realty owned by the lessor." ***Id.*** at 410, 538 N.W.2d at 618. Because the fixtures were abandoned at the termination of Kosmo's tenancy and became part of the realty at that point in time, it is irrelevant whether the DOT had authority to acquire them earlier.

4. HOLDING OVER

Finally, the City argues: "By continuing to permit his building to occupy city property, Kosmo remained in possession of the leased premises." It contends that the cost of razing the building constitutes damages recoverable under § 704.23, § 704.25(1) and § 704.27, STATS., providing for damages for "holding over." We disagree. The City points to no evidence that Kosmo did not vacate the warehouse as required. Failure to remove fixtures in absence of a lease requirement does not constitute "holding over." *See* ***Bence,*** 196 Wis.2d at 410, 538 N.W.2d at 618.

Based upon the undisputed facts of record, the City has failed to make any showing that Kosmo bears responsibility for the costs of razing the warehouse. We therefore reverse the judgment and remand with directions to enter summary judgment dismissing the City's counterclaim. *Cf.* § 802.08(6), STATS. ("If it shall appear to the court that the party against whom a motion for summary judgment is asserted is entitled to a summary judgment, the summary judgment may be awarded to such party even though the party has not moved therefor.").

By the Court. – Judgment reversed and cause remanded with directions.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.