

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**August 9, 2005**

Cornelia G. Clark  
Clerk of Court of Appeals

**NOTICE**

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

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2004AP2410**

**Cir. Ct. No. 2004SC23614**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**LDC-728 MILWAUKEE, LLC,**

**PLAINTIFF-APPELLANT,**

**v.**

**FRAUCHIGERS, LLC,**

**DEFENDANT-RESPONDENT.**

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APPEAL from an order of the circuit court for Milwaukee County:  
MICHAEL J. DWYER, Judge. *Reversed and cause remanded with directions.*

¶1 CURLEY, J.<sup>1</sup> LDC-728 Milwaukee, LLC (LDC) appeals the dismissal of its small claims eviction action against Frauchigers,<sup>2</sup> LLC

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2003-04).

<sup>2</sup> Frauchigers is often spelled “Frauchiger’s” throughout the record. We have chosen the spelling found in the caption for convenience.

(Frauchigers). LDC argues that the trial court erred when it dismissed its eviction action, determining that Frauchigers, by its agent John Raettig, substantially complied with the five-day notice to quit or pay rent owed Frauchigers. Because Frauchigers did not timely cure its default, and WIS. STAT. § 704.17(3)(a) (2003-04)<sup>3</sup> requires, in order to escape the termination of the lease, “all rent due must be paid on or before the date specified in the notice[,]” this court reverses and remands for proceedings consistent with this decision. This court also denies LDC’s request for costs under WIS. STAT. § 814.025(1) and (3)(b).

### **I. BACKGROUND.**

¶2 In late 2003, LDC purchased a downtown building from a prior company of Raettig’s on the eve of the building’s foreclosure. On December 30, 2003, LDC leased the first floor and basement of the building to Frauchigers. The complex commercial four-year lease contains twenty pages of provisions setting forth the obligations of the parties. Both parties were represented by counsel during the negotiations and at the time the lease was executed. Among the many requirements, the lease requires Frauchigers to pay a yearly rent of \$36,000, payable monthly at the rate of \$3,000. With respect to tardy rental payments, the lease calls for a late charge equal to two percent of the fixed rent to be paid immediately upon demand. The lease also obligates Frauchigers to pay, as additional rent, its proportionate share of the property taxes and any assessments made against the property. The lease contains a formula for determining the proportionate share. Frauchigers is to pay one-twelfth of these amounts in

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<sup>3</sup> All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

advance, on the first day of each calendar month, after the landlord estimates the amounts due and informs Frauchigers. Another provision, treated as additional rent, requires Frauchigers to pay to LDC:

... Tenant's Proportionate Share of the cost of managing, operating, lighting, landscaping, cleaning, removing snow and/or ice from the alley on the east side of the Building, policing, insuring, repairing, supplying, equipping, replacing and properly maintaining such common areas and facilities of the Building, together with the cost of repair, painting, maintenance, replacement and rental of signs, directories, doors, ... ceilings, windows, ... if any, to the extent not made a part of premises leased to any other tenant of the Building, refurbishing and modernizing equipment servicing the Building, salaries, wages, benefits and bonuses to Landlord's employees engaged in any of the foregoing maintenance or repair items, garage and recycling removal and container costs (excluding the salaries, wages, benefits and bonuses of management, supervisory or administrative staff) , and including an annual supervision fee in an amount equal to five percent (5%) of the costs incurred pursuant to this Section 4.2.

The parties refer to this lease provision as the Common Area Maintenance fee provision (CAM). One-twelfth of the CAM is also due every month after the landlord provides a statement of the estimates of such costs and expenses. The lease also permits an additional interest charge on any amount not paid when due.

¶3 Over the course of the ensuing seven months after the lease was signed, disputes arose between Frauchigers and LDC. Frauchigers continued to pay the rent of \$3,000 a month, but no payments were made on the CAM costs.<sup>4</sup> Additionally, the June check for rent was returned marked "NSF." A cashier's check was ultimately sent to cover this obligation; however, LDC also sought to

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<sup>4</sup> Raettig paid \$1,500 each month on behalf of Frauchigers, and another \$1,500 was taken from an escrow account.

collect a fee for the returned check, late fees for all the unpaid CAM charges, and finance charges.

¶4 LDC sent monthly invoices to Raettig reflecting the amounts due by Raettig. Despite the mailing of these invoices, no payments were made by Frauchigers except the monthly \$3,000 rental amount. Eventually, on July 14, 2004, LDC sent a five-day notice to quit or pay rent to Frauchigers by posting it pursuant to WIS. STAT. § 704.17(3). In response, Raettig sent a letter outlining his complaints about the charges and other matters of disagreement between the parties. The letter also contained a check for \$3,052.90, which Raettig said he was paying on behalf of Frauchigers “under strong protest” (emphasis omitted). Raettig explained in the letter that he calculated the amount of the check by subtracting out amounts sought by LDC for what he termed “non applicable random charges and late fees.” Unsatisfied with Raettig’s payment on Frauchigers’ behalf, LDC commenced an eviction action against Frauchigers.

¶5 At trial, the comptroller of LDC, Lee Augustine, testified that he sent a letter dated February 27, 2004, to Raettig, as an agent of Frauchigers, at the address set out in the lease, containing the amount of monthly CAM charges Frauchigers was required to pay, and explaining how the CAM charges were calculated. He also testified that he mailed monthly invoices to Raettig at the same address, and on at least one occasion hand-delivered some information to Raettig that Raettig had requested. He stated that Raettig never inquired of him how the CAM charges were calculated, despite the fact that on several occasions Raettig hand-delivered rent checks to him.

¶6 Raettig testified that he never received the February 27, 2004 letter, but did receive some, but not all, of the invoices sent to him. He claimed that he

did not pay the CAM amounts because he questioned how LDC arrived at the total and wanted clarification of the amounts being charged.

¶7 With regard to this issue, Raettig testified:

Q And in what ways did you ask for clarification from the Plaintiff?

A I wanted to know what the insurance charge was, if I was paying my own policy plus their policy. And I wanted to know how much I was paying on the building and what the overall taxes on the property now were and what numbers were being used to figure these amounts.

Q At what point in time did you start trying to contact them to get their information?

A I think it was in March. I know for certain that I talked with Tom in April, and I don't recall the exact date, but I spoke with Tom about it briefly at the realtors thing that was held at Ratzsch's and that may have been in March.

Q Tom[?] who are you referring to?

A DeMuth.

Q Mr. DeMuth.<sup>5</sup>

....

Q Just so I understand, you never wrote a letter, you may have—you e-mailed Mr. DeMuth for a meeting?

A Correct.

Q Any other efforts you made to find out the breakdown on this information?

A I wrote the letter in July when I tendered the [\$]3,052 again asking for clarification on the

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<sup>5</sup> Thomas DeMuth is a member of LDC.

charges. And I paid under protest because I still at that point didn't know what they were. But I took their invoice and tallied up what the CAM fees were because they were due by the lease, and that is how I arrived at [\$]3,052.90, and I sent it in.

The trial court concluded that Raettig substantially complied with the request to pay the outstanding rent and dismissed the eviction action, stating:

And so what I come down to is, technically plaintiff is entitled, he did not cure his default. He could have if he wasn't a stubborn, willful person, who I presume doesn't get legal advice, or if he does perhaps he doesn't get very good legal advice with a tremendous amount to lose.

....

[B]ased upon my sense of fairness here, with the confidence that Mr. Raettig will pay that sum before you can get back to your office and type a new five-day notice on the—on the back finance charges and late fees, I think justice is served in this case by finding substantial compliance with the notice by the payment made on July 17 and ordering that the eviction action be dismissed, and I do so order.

This appeal follows.

## II. ANALYSIS.

¶8 When an appellate court applies undisputed facts to the terms of a commercial lease, and determines the parties' rights under that lease, it exercises *de novo* review. See *Walters v. National Props., LLC*, 2005 WI 87, ¶6, \_\_\_ Wis. 2d \_\_\_, 699 N.W.2d 71. State statutes govern procedures for evicting a tenant who fails to pay rent or otherwise breaches the lease. WISCONSIN STAT. § 704.17(3)(a) describes the notice and procedure applicable to leases longer than one year in order to lawfully terminate the lease and evict the tenant. However,

this statute also permits a lease for more than one year to contain contrary termination provisions that will override § 704.17(3).<sup>6</sup> The lease at issue covers more than one year and includes specific provisions on termination. Therefore, in this case, we begin by reviewing the lease provisions, not the statute.

¶9 With regard to notice, the lease reads:

20.1. If Tenant shall fail to pay the Fixed Rent, Rental or other charges due hereunder within five (5) days after the same shall be due, ... then in any such case, Landlord may, without notice to Tenant, notice being expressly hereby waived, terminate the tenancy created under this Lease and recover possession of and re-enter the Leased Premises without affecting Tenant's liability for past Rental and other charges due or future Rental and other charges to accrue hereunder.

Despite this more permissive lease provision allowing LDC to terminate the lease for non-payment of rent or other charge without notice after five days have elapsed from the date due, LDC chose to give Frauchigers a five-day notice to quit or pay rent. As noted, WIS. STAT. § 704.17(3) applies to leases running for more than one year and sets out this procedure for terminating a lease:

**704.17 Notice terminating tenancies for failure to pay rent or other breach by tenant. ...**

**(3) LEASE FOR MORE THAN ONE YEAR.** (a) If a tenant under a lease for more than one year fails to pay rent when due, or commits waste, or breaches any other covenant or condition of the tenant's lease, the tenancy is terminated if the landlord gives the tenant notice requiring the tenant to pay the rent, repair the waste, or otherwise comply with the lease on or before a date at least 30 days after the giving of

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<sup>6</sup> WISCONSIN STAT. § 704.17(5) provides that “[p]rovisions in the lease or rental agreement for termination contrary to this section are invalid except in leases for more than one year.”

the notice, and if the tenant fails to comply with the notice.<sup>7</sup> A tenant is deemed to be complying with the notice if promptly upon receipt of the notice the tenant takes reasonable steps to remedy the default and proceeds with reasonable diligence, or if damages are adequate protection for the landlord and the tenant makes a bona fide and reasonable offer to pay the landlord all damages for the tenant's breach; *but in case of failure to pay rent, all rent due must be paid on or before the date specified in the notice.*

(Emphasis and footnote added.)

¶10 LDC served Frauchigers with a five-day notice, although it need not have done so. As the statute directs, when it is alleged that rent is due, to avoid the termination of the lease, “all rent due must be paid on or before the date specified in the notice.” WIS. STAT. § 704.17(3)(a). 49 AM. JUR. 2D *Landlord and Tenant* § 265 (1995) explains the notice requirement: “The purpose of a notice to cure is to specifically apprise the tenant of claimed defaults in its obligations under the lease and of the forfeiture and termination of the lease if the claimed default is not cured within a set period of time.” *Id.* (footnote omitted). Raettig failed to appreciate the notice's purpose.

¶11 Although Raettig was involved in the negotiation of the lease, he ignored many of its essential provisions. The lease requires Frauchigers to pay, in addition to a set rental amount and a pro rata share of the real estate taxes and the like, the following: § 2.2, late charges for rent not received by the fifth day of the month; § 4.2, a proportionate share of CAM charges; § 12.1, for a policy of liability insurance; § 12.3, a proportionate share of landlord's property insurance;

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<sup>7</sup> Inasmuch as the lease required no notice whatsoever, the thirty-day notice period is not applicable here.



§ 25.4, interest on unpaid amounts; and § 25.12, a security deposit. In addition, § 25.15 requires Raettig to sign a personal guaranty. Why Raettig was unaware of these provisions is a mystery. Indeed, one of the provisions, § 25.6, states that,

Both parties have been either represented by counsel or given the chance to review this Lease with counsel, and therefore, this Lease shall be construed not for or against Landlord or tenant, but shall be interpreted in accordance with the general tenor of the language in an effort to reach an equitable result.

Raettig should have either inquired what charges he was responsible for at the time the lease was negotiated or read the lease later to learn of his responsibilities. It is textbook law that a person signing a legal instrument is presumed to know the contents of the lease and the obligations created under it. *Stockinger v. Central Nat. Ins. Co.*, 24 Wis. 2d 245, 252, 128 N.W.2d 433 (1964) (presumption that contents of signed instrument are understood by signer is not overcome by signer's statements that he did not understand nature of instrument signed). Thus, Raettig's alleged confusion or misunderstanding of the lease provisions is not a legal defense to enforcement of the lease provisions.

¶12 Further, Raettig's actions were not those of a reasonable lessee. A reasonable lessee, uncertain about his or her obligations under a lease, would have sought clarification of any confusing lease provision before the obligation became overdue. Raettig testified that he did not even attempt to discern what amount was payable for CAM charges until March, three months into the lease period. Assuming that Raettig did not receive all the monthly invoices as he claimed, he admitted to receiving some, and consequently knew that under the lease he was responsible for additional payments. Once put on notice of the additional payments, Raettig's attempts at determining the basis for the amounts were half-hearted. He sent an email, but he never sent a formal letter requesting the

information, nor inquired of anyone at LDC what other amounts were due on those occasions when he hand-delivered his rent. Raettig's actions after receiving the notice are also curious. Faced with a legal notice to pay the rent or quit, Raettig sent back a letter disputing the amounts, and while paying some overdue amounts, subtracted out certain sums for which he did not believe he was legally obligated to pay. Given that the lease clearly set out the additional charges Raettig could incur for untimely payments, Raettig's actions suggest he never bothered to read the lease provisions to learn of his obligations. He also apparently underestimated the seriousness of his situation, inasmuch as he could have avoided the termination of his lease by paying the remaining amount of approximately \$1,000, having already paid over \$3,000, and negotiated the disputed amounts later. From his actions, it appears that Raettig never mentally made the transition from being the owner of the property to being the lessee.

¶13 Nor did Raettig substantially comply with the request for payment. At the time of trial, Raettig still owed over \$1,000 of unpaid fees. This amount does not constitute a "technical" violation as suggested by the trial court. Moreover, in light of the statutory mandate that overdue rent must be paid in full, the doctrine of "substantial compliance" does not defeat the language of the lease. As a consequence, LDC is entitled to an eviction judgment against Frauchigers. Accordingly, the trial court's decision is reversed and the cause is remanded to the trial court for further proceedings consistent with this opinion.

¶14 Finally, LDC seeks costs under WIS. STAT. § 814.025(1) and (3)(b). Any request for costs under this statute should first be addressed to the trial court.

*By the Court.*—Order reversed and cause remanded with directions.

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

