

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 28, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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No. 00-0900

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

OAKDALE COMPANY,

**PLAINTIFF-RESPONDENT-
CROSS-APPELLANT,**

v.

QUADRA INCORPORATED,

**DEFENDANT-APPELLANT-
CROSS-RESPONDENT.**

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Racine County: ALLAN B. TORHORST, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Nettlesheim, Anderson and Snyder, JJ.

¶1 PER CURIAM. Quadra, Incorporated leased commercial business property from Oakdale Company. Quadra appeals from the judgment awarding

Oakdale unpaid property taxes and costs and attorney's fees and denying Quadra's counterclaim for the value of two overhead cranes used on the property. Oakdale cross-appeals from the denial of damages for Quadra's alleged failure to maintain the leased property in a reasonable state of repair and the denial of additional attorney's fees incurred for trial preparation, trial, and posttrial. We affirm the judgment with respect to ownership of the cranes and the denial of Oakdale's claim for failure to maintain the premises. We reverse the determination of property taxes for which Quadra is responsible. In light of our partial reversal, we remand to the trial court the question of whether Oakdale should recover attorney's fees and costs.

¶2 The first issue presented by the appeal is Quadra's obligation under the lease to pay property taxes. Construction of a contract is a legal question that we decide independently of the trial court's determination. *See Old Tuckaway Assocs. Ltd. Partnership v. City of Greenfield*, 180 Wis. 2d 254, 280, 509 N.W.2d 323 (Ct. App. 1993). We will enforce the unambiguous language of a contract as it is written. *See id.*

¶3 Starting in 1985, Quadra manufactured machinery and specialty products at the premises leased from Oakdale.¹ The lease was extended several times. The lease provides: "The Lessee shall pay all real estate taxes and special assessments levied against the demised premises and for all license and occupational fees and charges assessed or charged by governmental authorities against the Lessee for the use and occupancy of the demised premises." It was Quadra's practice to pay property taxes in quarterly installments in the year

¹ The original lease was executed by Associated Industrial Design and Engineering, Inc. (AIDE). AIDE subsequently became Quadra, Incorporated.

subsequent to the year of assessment. The extended lease expired on July 31, 1998. Upon leaving the premises, Quadra paid seven-twelfths of the 1997 property taxes. Oakdale claims that Quadra breached the lease because it was required to pay all of the 1997 taxes and seven-twelfths of the 1998 tax assessment. The trial court concluded that because the property taxes become a lien against the land on January 1 of the tax year, Quadra was liable for the taxes claimed by Oakdale.

¶4 Quadra seeks to have the property tax issue determined consistent with the parties' conduct and practice of paying taxes in installments. Quadra explains that it has paid eleven years, seven months' worth of taxes which corresponds to its period of occupancy. However, the practice of paying in installments and the fact that Quadra may have paid 1986 taxes for which it was not responsible cannot override the plain language of the lease.

¶5 The lease requires Quadra to pay property taxes levied during its occupancy of the property. WISCONSIN STAT. § 70.01 (1999-2000)² provides that real estate taxes "are deemed to be levied when the tax roll in which they are included has been delivered to the local treasurer under s. 74.03" and that they become a lien against the property effective as of January 1 in the year the taxes are levied. The tax roll is transferred to the treasurer by December 8. WIS. STAT. § 74.03(1). While the lien precedes the levy, the taxes are not levied until the December delivery of the tax roll to the treasurer.

¶6 The lease does not require Quadra to pay taxes that may have accrued during its occupancy; the lease only requires it to pay taxes levied during

² All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

its occupancy. Thus, the 1997 taxes were levied in December 1997, during Quadra's use and occupancy of the premises. Quadra is responsible for the entire 1997 tax levy. The 1998 taxes were not levied until December 1998. Quadra had already vacated the premises. Since the 1998 taxes were not levied during Quadra's use and occupancy of the premises, Quadra is not liable for the 1998 taxes, or any portion of them. The judgment for property taxes is reversed since it includes seven-twelfths of the 1998 taxes. On remand, judgment shall be entered only for that portion of the 1997 property taxes that Quadra did not pay.

¶7 The next issue is ownership of the two overhead cranes used in Quadra's business. Quadra relies on Article V of the lease, which provides in relevant part: "[T]he Lessee shall retain title to fixtures, machinery and apparatus used in connection with Lessee's business." This provision in the lease embodies the common law rule on the right of a tenant to retain ownership of and the right to remove "trade fixtures." *Auto Acceptance & Loan Corp. v. Kelm*, 18 Wis. 2d 178, 182, 118 N.W.2d 175 (1962). Under this rule, "a tenant who brings upon realty a chattel, the purpose of which is to further the tenant's trade or business, will be allowed to remove that chattel at the expiration of his lease, provided that the removal will not constitute material injury to the premises." *Id.* The right to remove is dependent on the tenant having had initial ownership of the fixture. *See Premonstratensian Fathers v. Badger Mut. Ins. Co.*, 46 Wis. 2d 362, 373-74, 175 N.W.2d 237 (1970) (the law of trade fixtures relates to property brought onto the premises by the lessee). Standing alone, Article V of the lease does not vest ownership in Quadra unless it held "title" ownership of the cranes. The lease does not operate to transfer ownership.

¶8 The question of ownership of the cranes presented a question of fact for the trial court. *See Hughes v. Hughes*, 148 Wis. 2d 167, 171, 434 N.W.2d 813

(Ct. App. 1988). The trial court found that Oakdale owned the cranes. The trial court's findings of fact will not be set aside unless clearly erroneous. WIS. STAT. § 805.17(2). “[E]ven though the evidence would permit a contrary finding, findings of fact will be affirmed on appeal as long as the evidence would permit a reasonable person to make the finding.” *Sellers v. Sellers*, 201 Wis. 2d 578, 586, 549 N.W.2d 481 (Ct. App. 1996).

¶9 The factors bearing on ownership are title, control, intent, possession, and right to use. *Hughes*, 148 Wis. 2d at 172. Antons Vrublevskis, a partner in Oakdale, testified that the cranes were made part of the building as the building and subsequent extensions were constructed. He explained that Oakdale paid for the cranes. Oakdale consistently reported “cranes and craneways” as part of the real estate in its Wisconsin Manufacturing Real Estate Return. Oakdale produced an exhibit detailing expenses it incurred on the cranes, including reimbursement to AIDE for some crane-related expenditure. Frederick Witt, AIDE shareholder and accountant until December 30, 1986, testified that AIDE never listed the cranes on its asset ledger since the entire cost of the cranes had been paid by Oakdale.³ Witt indicated that Oakdale had taken depreciation on the cranes over a twenty-year period. On December 30, 1986, Oakdale gave Marine Bank South a security interest in “equipment, furniture and fixtures which may or may not be attached to the building ... except overhead cranes which are attached to the building.” Vrublevskis testified that the financing statement exhibiting the security interest was provided to Victor Stepaniuk, a principal in VS, Inc., at the

³ An inter-relationship between Oakdale and AIDE existed. Three of Oakdale's four partners, Vrublevskis, Witt, and Roy Stewart, were the controlling shareholders of AIDE. On December 30, 1986, these three individuals sold their controlling interest in AIDE to VS, Inc., a corporation controlled by Victor Stepaniuk and his wife.

time VS, Inc. acquired the controlling interest in AIDE. Although the sale prospectus and appraisal of AIDE's assets listed the two overhead cranes, Vrublevskis said he clarified with the bank officer providing financing to VS, Inc. that the cranes did not belong to AIDE. Quadra did not remove the cranes upon termination of the lease or within thirty days.⁴

¶10 There was contradicting testimony about the representations made at the time VS, Inc. acquired the controlling interest of AIDE.⁵ However, the trial court made a credibility determination in accepting Vrublevskis's testimony that the cranes were always considered to be Oakdale's property. The trial court is the ultimate arbiter of the witnesses' credibility when it acts as the fact finder and there is conflicting testimony. See *Bank of Sun Prairie v. Opstein*, 86 Wis. 2d 669, 676, 273 N.W.2d 279 (1979). The trial court found that the listing of the cranes in the sales prospectus and appraisal was inaccurate. Other evidence supports the finding that the cranes were treated as Oakdale's property. We conclude that the trial court's finding of ownership is not clearly erroneous and affirm that portion of the judgment denying Quadra's counterclaim for the value of the cranes.

⁴ Under the lease, the failure to remove fixtures within thirty days of termination conclusively established that the fixtures were abandoned. Oakdale does not contend that Quadra's failure to remove the cranes conclusively establishes that the cranes became part of the realty. See *Bence v. Spinato*, 196 Wis. 2d 398, 410, 538 N.W.2d 614 (Ct. App. 1995) ("if a lessee fails to remove the trade fixtures within a reasonable time after 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.").

⁵ Stepaniuk testified that when he was in the process of having the assets of AIDE appraised for the purpose of purchasing the controlling interest, Vrublevskis told him that the cranes were AIDE's and that they should be included in the appraisal.

¶11 Before addressing the final issue in Quadra's appeal, we turn to Oakdale's cross-appeal of the dismissal of its claim that Quadra failed to maintain the premises in reasonable repair. Oakdale claims that Quadra caused permanent damage to the building that diminished the value by at least \$50,000. With the exception of a bullet hole in a window, the trial court found that Quadra reasonably maintained the premises and that its occupancy of the building had not caused any unusual deterioration or wear of the building. Once again, we observe that the trial court is charged with weighing the evidence and determining credibility of the witnesses; its findings will not be disturbed on appeal unless they are clearly erroneous. *Johnson v. Miller*, 157 Wis. 2d 482, 487, 459 N.W.2d 886 (Ct. App. 1990).

¶12 Quadra's maintenance manager testified about the efforts made to clean up the building and repair various things after Quadra vacated the building. He indicated that furnaces and air conditioning systems in the building were serviced over the years of Quadra's occupancy, that a cleaning service regularly tended to the building, and that a lawn service had been hired to keep the grass cut. A long-term AIDE/Quadra employee testified that other than ordinary wear and tear there was no significant difference in the condition of the property from when AIDE occupied the property in 1986 to termination of the lease in 1998. This evidence, even in the face of Oakdale's complaints about broken ceiling tiles, inoperative light fixtures, missing lenses on lights, wall damage caused by a leaky roof, and floor damage, is sufficient to sustain the trial court's findings. Moreover, Oakdale did not present evidence on how certain items diminished the value of the building. Oakdale sold the property at an amount the trial court found to be fair market value.

¶13 Oakdale argues that under the repair and maintenance provision of the lease, it does not bear the burden of ordinary wear and tear on the building.⁶ The lease provision on repairs and maintenance does not define in what condition the premises must be at the time of the termination of the lease. It only imposes upon Quadra the obligation to make such repairs as may be necessary for its use of the property. *Lindsay Bros., Inc. v. Milwaukee Cold Storage Co.*, 58 Wis. 2d 658, 665, 207 N.W.2d 639 (1973). “A clause of this kind is properly construed to impose only a minimal duty on the tenant to undertake repairs.... Upon termination, a lessee is in full compliance if the premises, except for ordinary wear and tear, are in the same condition as they were at the commencement of the term.” *Id.* at 666. Absent a specific duty to return the premises in the exact same condition, a covenant to repair does not place any burden on the lessee to improve the premises. *See id.* at 664-65. Indeed, the only provision in the lease that arguably speaks to the property’s condition at termination is the provision on trade fixtures. That provision permits the removal of trade fixtures provided “that said Lessee leaves the demised premises in the same condition of repair, reasonable wear and tear excepted.” It was not error for the trial court to consider what constituted reasonable wear and tear of the building.

⁶ The lease provides in relevant parts:

The Lessee shall maintain the interior of the demised premises in a reasonable state of maintenance and repair, and shall also maintain and keep in repair the plumbing, electrical, heating and air conditioning systems of the demised premises, all at the Lessee’s expense....

Lessee shall keep exterior of the building and grounds in a reasonable state of maintenance and repair.

¶14 The remaining issue is whether Oakdale should have been awarded costs and attorney's fees in this litigation. Oakdale's cross-appeal argues that the trial court should have made a greater award than it did.⁷ Costs and attorney's fees were awarded under the lease provision which obligates Quadra to pay Oakdale's expenses for litigation in which Quadra causes Oakdale to become involved.⁸ Quadra argues that it did not cause Oakdale to become involved in this litigation, particularly since many of Oakdale's claims were unfounded and Oakdale was not the prevailing party for a majority of the action.

¶15 We need not decide the issue raised by the parties. The trial court's award of attorney's fees and costs was based on the judgment in favor of Oakdale on the property tax claim. We reverse that portion of the judgment, meaning that Oakdale has prevailed on only a small part of the tax claim. Thus, a redetermination of attorney's fees is required. *See id.* at 670. While Oakdale may be entitled to recover attorney's fees and costs incurred in the defense of Quadra's counterclaims, *see Aspen Services, Inc. v. IT Corp.*, 220 Wis. 2d 491, 494, 583 N.W.2d 849 (Ct. App. 1998), the trial court should consider whether Oakdale "achieved substantial success and the unsuccessful claims were brought and pursued in good faith." *Radford v. J.J.B. Enters., Ltd.*, 163 Wis. 2d 534, 550, 472 N.W.2d 790 (Ct. App. 1991). Even a contractual provision for attorney's fees is tempered by concepts of justice and fair play to avoid the unreasonable result

⁷ At trial Oakdale presented an exhibit detailing attorney's fees and costs. The trial court included \$6,191.76 in the judgment for attorney's fees and costs. Oakdale moved for an additional award for the attorney's fees incurred in preparing for trial, trial and posttrial on the ground that such fees were not known at the time of trial. The motion was denied.

⁸ Article IX(b) of the lease provides: "Lessee shall pay all Lessor's costs, charges and expenses including the fees of counsel, agents and other retained by Lessor incurred in enforcing Lessee's obligations hereunder or incurred by Lessor in any litigation, negotiation, or transaction in which Lessee causes Lessor, without Lessor's fault, to become involved."

where the winner pays the loser. *See Borchardt v. Wilk*, 156 Wis. 2d 420, 428, 456 N.W.2d 653 (Ct. App. 1990). This is commensurate with the direction that the “character and importance of the litigation” are factors to be considered in determining the reasonable value of attorney’s fees. *Aspen Servs.*, 220 Wis. 2d at 496.

¶16 The judgment is reversed with respect to the award of taxes owed by Quadra and attorney’s fees and costs. The dismissal of Oakdale’s claim for improper maintenance of the property and Quadra’s claim for the value of the overhead cranes is affirmed. The cause is remanded with instructions to enter judgment against Quadra for the unpaid portion of the 1997 tax levy and for reconsideration of the request for attorney’s fees and costs. No costs to either party on appeal.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

