

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 5, 2006

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. 2005AP2786

Cir. Ct. No. 2002CV213

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

GRUBB STAKE PROPERTIES, III, LLC,

PLAINTIFF-APPELLANT,

v.

**SILVER BULLET MANAGEMENT CORPORATION, JOHN ST. GERMAIN,
WILLIAM W. HALL, JOHN J. OPOLKA, JOHN DOE, AS TRUSTEE TO
THE BRIAN ST. GERMAIN TRUST, AND MARY ROE, AS TRUSTEE TO THE
PETER ST. GERMAIN TRUST,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment and orders of the circuit court for Vilas County: NEAL A. NIELSEN, III, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 HOOVER, P.J. Grubb Stake Properties, III, LLC, appeals that portion of a summary judgment holding Grubb Stake is not entitled to collect

damages for diminution of value from Silver Bullet Management Corporation.¹ Grubb Stake asserts diminution damages are not prohibited by Wisconsin law and, in any event, the lease provided for such damages. We conclude Grubb Stake accepted Silver Bullet's surrender of the property, thereby terminating the lease, and an action for diminution damages is inconsistent with such an election. Accordingly, we affirm the judgment and orders.

Background

¶2 In June 1996, Grubb Stake leased property to Silver Bullet under a twenty-year agreement. The lease provided, in part:

In the event of any default hereunder ... the rights of Lessor shall be as follows:

14.1 Lessor may re-enter the Premises immediately After re-entry Lessor may terminate the Lease on giving thirty (30) days' written notice of termination to Lessee. Without notice, re-entry will not terminate the Lease. On termination Lessor may recover from Lessee all damages proximately resulting from the breach, including the cost of recovering the Premises, and the worth of the balance of this Lease over the reasonable rental value of the Premises for the remainder of the Lease term, which sum shall be immediately due Lessor from Lessee.

Possible methods of default, as detailed in the lease, included: if lessee or an assignee filed a bankruptcy petition while in possession of the property; if lessee

¹ There are two orders and a judgment in this case. The first order, dated August 22, 2005, granted summary judgment to Silver Bullet on the damages issue, but also granted summary judgment to Grubb Stake regarding the extent of Silver Bullet's shareholders' liability. An order for judgment dated October 18, 2005, granted Grubb Stake's summary judgment in part regarding the shareholders and denied it in part regarding the damages issue. On October 20, 2005, final judgment was entered, disposing of the case. The question of shareholder liability is not before us on appeal.

failed to pay rent within thirty days of the due date; or if lessee vacated the property.

¶3 In February 1999, Silver Bullet assigned its lease to AmeriKing Corporation, with Grubb Stake's permission. AmeriKing became bound by all the terms of the original lease. The assignment, however, required Silver Bullet to remain responsible for full performance of the lease.

¶4 In November 2002, AmeriKing stopped making full rental payments. In December, it filed a Chapter 11 bankruptcy petition. In February 2003, AmeriKing unilaterally reduced its rental payments from approximately \$7,000 per month as required by the lease to \$3,000 per month. In December 2003, AmeriKing rejected the lease and abandoned the property to Grubb Stake with the bankruptcy court's approval.

¶5 On May 5, 2004, Grubb Stake accepted a written offer to sell the property outright, subject to "no known leases." The sale closed around June 13, 2004. At that point, just over twelve years remained on Silver Bullet's lease. Grubb Stake brought this suit against Silver Bullet seeking unpaid rent and other damages.

¶6 Grubb Stake and Silver Bullet stipulated to the amount of unpaid rent between November 1, 2002, when AmeriKing stopped making payments, and the June 13, 2005 sale. But Grubb Stake also sought diminution damages, arguing it sold the property for "substantially less" than it could have had there been a paying tenant occupying the site at the time of sale.

¶7 The parties filed cross-motions for summary judgment. The circuit court concluded that Grubb Stake elected to accept surrender and termination of

the lease, limiting Grubb Stake's damages to the amount of rent due and unpaid at the time of the sale. Grubb Stake appeals.

Discussion

¶8 We review summary judgments de novo, using the same methodology as the circuit court. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). That methodology is well established and we need not repeat it here. *Lambrecht v. Estate of Kaczmarczyk*, 2001 WI 25, ¶¶20-24, 241 Wis. 2d 804, 623 N.W.2d 751. Generally, when both parties move for summary judgment and neither asserts there is a factual dispute barring the other's motion, the practical effect is that the facts are stipulated, leaving only questions of law for us to resolve. *Selzer v. Brunsell Bros.*, 2002 WI App 232, ¶11, 257 Wis. 2d 809, 652 N.W.2d 806.

¶9 Under Wisconsin law, if a tenant vacates the rental property before the lease expires, the landlord has two options. One option is to accept the tenant's surrender, terminating the lease and ending the tenant's liability under the contract. The other option is to mitigate damages by re-entering and reletting the premises, crediting payments from a successor tenant to the initial tenant's lease obligations. See WIS. STAT. § 704.29(1)²; *CCS North Henry, LLC, v. Tully*, 2001 WI App 8, ¶11, 240 Wis. 2d 534, 624 N.W.2d 847. The right to elect a remedy follows the landlord until he or she makes the election by taking some step clearly evincing an intent to choose between the two inconsistent remedies. *Vander Wielen v. Van Asten*, 2005 WI App 220, ¶23, 287 Wis. 2d 726, 706

² All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

N.W.2d 123. If a landlord does not accept surrender, however, the landlord must mitigate damages by attempting to re-rent the premises. *Id.*, ¶25; *see also* WIS. STAT. § 704.29(1).

¶10 Here, the trial court determined the issue was whether Grubb Stake's sale of the property was an act of mitigation or an act unequivocally demonstrating acceptance of surrender. The trial court concluded the sale was an act accepting surrender and limited Silver Bullet's liability accordingly.

¶11 Grubb Stake argues it intended the sale to be an act of mitigation. The court, however, noted there was no evidence Grubb Stake tried to re-rent the property prior to selling it. But Grubb Stake also asserts its sale was privileged under WIS. STAT. § 704.29(4) as one of the acts that "do not defeat the landlord's right to recover rent and damages and do not constitute an acceptance of surrender." Specifically, Grubb Stake relies on § 704.29(4)(d), protecting "[a]ny other act which is reasonably subject to interpretation as being in mitigation of rent or damages and which does not unequivocally demonstrate an intent to release the defaulting tenant." Under this paragraph, Grubb Stake argues, it can take any action as long as that act can be construed as one of mitigation.

¶12 The error in Grubb Stake's argument, however, is that it ignores the latter half of the paragraph, the portion indicating an act is privileged only if it "does not unequivocally demonstrate an intent to release the defaulting tenant" from the lease obligations. Case law explains that the sale of property, subsequent to a breach, "evidences a clear intent to make the election between accepting the surrender and terminating the lease, and entering and taking possession of the premises for the purpose of mitigating damages." *First Wis. Trust Co. v. L. Wiemann Co.*, 93 Wis. 2d 258, 274, 286 N.W.2d 360 (1980). In other words,

under *Wiemann*, the sale of property, after a tenant abandons it in breach of the lease, is not an act of mitigation but, rather, constitutes acceptance of surrender by operation of law. Accepting the tenant's surrender thus ends all of the tenant's liability under the lease, regardless of any terms in the lease attempting to avoid such a result.³

By the Court.—Judgment and orders affirmed.

Recommended for publication in the official reports.

³ While our analysis, driven by *First Wis. Trust Co. v. L. Wiemann Co.*, 93 Wis. 2d 258, 286 N.W.2d 360 (1980), is dispositive, we further note that Grubb Stake has made no attempt to show that Silver Bullet's breach proximately caused the diminution damages. Indeed, the circuit court appears to have attributed at least part, if not all, of the diminished value to Grubb Stake's failure to seek a new tenant prior to the sale. We are also unconvinced the lease demonstrates the parties' mutual contemplation of diminution or other damages in the event of the property's sale.

