COURT OF APPEALS
DECISION
DATED AND FILED

January 4, 2007

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP1102 **Cir. Ct. No. 2005CV183**

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

JAMES RIPP AND JOANN RIPP,

PLAINTIFFS-APPELLANTS,

V.

THOMAS P. SAYRE AND DONNA SAYRE,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Rock County: DANIEL T. DILLON, Judge. *Affirmed*.

Before Lundsten, P.J., Dykman, Vergeront, JJ.

¶1 VERGERONT J. James and Joann Ripp seek specific performance of an option to purchase property they leased from Thomas and Donna Sayre, or, in the alternative, damages. The circuit court granted summary judgment in favor of the Sayres, concluding that it was undisputed that the lease was no longer in

effect when the Ripps gave the two notices of their intent to exercise the option to purchase. The Ripps appeal, contending that it is undisputed that the lease was in effect both in November 1998 when they first gave notice of their exercise of the option to purchase and in September 2004 when they again gave notice.

¶2 With respect to the November 1998 notice, we conclude based on the undisputed facts that, even if the lease was in effect at that time, the notice was not within the time period required by the lease and the Sayres did not waive that time restriction in writing as required by the lease. With respect to the September 2004 notice, we conclude, based on the undisputed facts, that the lease was no longer in effect at that time. Accordingly, we affirm the circuit court's order granting summary judgment in the Sayres' favor and dismissing the complaint.

BACKGROUND

¶3 The following facts are not disputed unless otherwise indicated. The Ripps and the Sayres entered into an agreement titled "Lease Agreement with Option to Purchase" for the occupancy and use of a farm the Sayres owned,[1] with the lease term beginning February 1, 1988. The lease established a variety of accounting procedures through which the parties shared responsibilities for maintaining and running the farm. The lease specified that the option to purchase must be exercised by the Ripps "not less than 120 days before the end of the lease term or any extension there of." The lease also specified the manner in which the parties were to carry out the transaction in the event the Ripps did exercise the

[1] The Sayres bought the farm in January 1988 following a foreclosure action against the Ripps.

option, including provisions on the methodology for determining the purchase price.

¶4 The term of the lease was as follows:

> *Term*. The term of this lease shall be 5 years, from February 1, 1988, to January 31, 1993, and this lease shall continue in effect from year to year thereafter until written notice of termination is given by either party to the other at least four months before expiration of this lease or any renewal hereof. Notwithstanding the above, Tenant shall have an option to extend this lease for an additional five year term, from February 1, 1993 to January 31, 1998, provided Tenant provides Landlord with written notice of the exercise of said option at least four months before the expiration of the initial term of this lease.

¶5 Pursuant to the above provision, the Ripps exercised the option to extend the lease to January 31, 1998. After that date, the Ripps continued to occupy and use the farm.

¶6 On September 30, 1998, the Sayres served the Ripps by certified mail with a notice that the "tenancy of … [the] premises is … terminated to take effect on … [the] 31st day of January, 1999," and that the Ripps were required to quit the premises by that date. On November 13, 1998, James Ripp sent a letter to Thomas Sayre stating that he "[would] exercise [his] option to purchase the farm" and asked Sayre to inform him of the purchase price of the farm. The Sayres' attorney sent letters to James Ripp on December 23, 1998 and January 5, 1999 that referred to the Ripps' exercise of the option to purchase and to the need for discussion on the purchase price. The letters will be discussed in more detail later in the opinion. The parties never agreed upon a purchase price and no sale took place. The reasons for this are disputed by the parties.

¶7 The Ripps continued to occupy and use the property. By letter dated September 3, 2004, the Sayres notified the Ripps that the "year-to-year lease … will not be renewed for the year 2005" and that the Ripps were to vacate the property by January 31, 2005. By letter dated September 24, 2004, James Ripp informed the Sayres that "I will exercise my option to purchase, by January 31, 2005…."

¶8 In February 2005, the Ripps, still occupying the property, filed this action alleging that the Sayres had breached their lease with the Ripps by failing to act on the Ripps' exercise of the option to purchase in 1998 and in 2004. The complaint sought specific performance, or, in the alternative, damages.[2] The complaint alleged that the Ripps had the right to exercise the option to purchase in 1998 because the lease was then still in effect and they had the right to do so in 2004 because after January 31, 1999, the lease, including the option to purchase provision, continued from year to year. The Sayres' answer alleged that the parties could not agree on an extension of the lease, the Ripps therefore became periodic tenants under WIS. STAT. § 704.25(2), the option to purchase was not a term of the periodic tenancy under § 704.25(3),[3] and therefore they were not obligated to honor either option to purchase.[4]

[2] According to the Sayres' brief, the day before the Ripps filed this action, the Sayres filed an eviction action in Rock County small claims court, which was transferred to large claims court after the Ripps filed a counterclaim in the eviction action that was identical to their complaint in this action. Because it appears from the parties' briefs that the eviction action does not affect the issues before us on this appeal, we do not discuss it further.

[3] WISCONSIN STAT. § 704.25(2) and (3) provide:

(continued)

¶9 The Sayres filed a motion to dismiss accompanied by factual submissions, and the court therefore treated the motion as one for summary judgment. *See* WIS. STAT. § 802.06(2)(b). The court granted the motion in the Sayres' favor. The court concluded that, under the plain language of the lease, the lease terminated at the end of the second five-year period on January 31, 1998, and

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> **(2)** CREATION OF PERIODIC TENANCY BY HOLDING OVER. (a) *Nonresidential leases for a year or longer*. If premises are leased for a year or longer primarily for other than private residential purposes, and the tenant holds over after expiration of the lease, the landlord may elect to hold the tenant on a year-to-year basis.
>
> (b) *All other leases*. If premises are leased for less than a year for any use, or if leased for any period primarily for private residential purposes, and the tenant holds over after expiration of the lease, the landlord may elect to hold the tenant on a month-to-month basis; but if such lease provides for a weekly or daily rent, the landlord may hold the tenant only on the periodic basis on which rent is computed.
>
> (c) *When election takes place*. Acceptance of rent for any period after expiration of a lease or other conduct manifesting the landlords intent to allow the tenant to remain in possession after the expiration date constitutes an election by the landlord under this section unless the landlord has already commenced proceedings to remove the tenant.
>
> **(3)** TERMS OF TENANCY CREATED BY HOLDING OVER. A periodic tenancy arising under this section is upon the same terms and conditions as those of the original lease except that any right of the tenant to renew or extend the lease, or to purchase the premises, or any restriction on the power of the landlord to sell without first offering to sell the premises to the tenant, does not carry over to such a tenancy.

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

[4] The Sayres also filed a counterclaim, alleging that the Ripps had failed to pay rent due under the periodic tenancy and seeking overdue rent. According to the circuit court's written decision, the parties stipulated to an amount that the Ripps owed the Sayres. In their brief on appeal, the Ripps appear to dispute that they owe certain amounts to the Sayres. However, these arguments are made in the context of the Ripps' point that no breach by them of any agreement is a bar to specific performance. Because we conclude the Ripps are not entitled to specific performance for other reasons, we do not address the arguments in section IV of their main brief.

the option to purchase had to be exercised no later than October 2, 1997, 120 days before termination. Because there was no dispute that the Ripps did not attempt to exercise their option to purchase until November 13, 1998, the court concluded there was no valid exercise of the option to purchase. In response to the Ripps' argument that the December 23, 1998 and January 5, 1999 letters from the Sayres' attorney constituted a waiver of the 120-day time period, the court concluded they were not a "waiver in writing" as required by the terms of the lease. The court agreed with the Sayres that after the termination of the lease there was a year-to-year tenancy under WIS. STAT. § 704.25(2) and the same terms and conditions of the original lease continued with the exception, among others, of the tenant's right to purchase the property. *See* § 704.25(3).

DISCUSSION

¶10 On appeal the Ripps argue that the circuit court erred in granting summary judgment in favor of the Sayres rather than in their favor because, they assert, their exercise of the option to purchase in both 1998 and 2004 was valid and required the Sayres to respond as provided in the lease.

¶11 Summary judgment is proper when there are no issues of material fact and one party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). We review de novo the grant and denial of summary judgment, employing the same methodology as the circuit court. *See* ***Green Springs Farms v. Kersten***, 136 Wis. 2d 304, 314-15, 401 N.W.2d 816 (1987).

¶12 We address first the 1998 exercise of the option to purchase. The Ripps contend the circuit court erred in construing the term provision of the lease. According to the Ripps, under that provision the lease did not automatically terminate after the second five-year term, but instead continued in effect from year

to year thereafter until the requisite written notice was given. Under this construction of the term provision, because the Sayres did not give a written notice to terminate the lease four months before January 31, 1998, the lease continued in effect for another year, giving the Ripps the right to exercise the option to purchase in 1998. The Ripps acknowledge that under this theory the deadline for exercising the option was October 3, 1998—120 days before the end of the one-year extended term on January 31, 1999—and that they did not exercise the option until November 13, 1998. However, the Ripps assert, the Sayres waived the 120-day requirement by engaging, in writing, in negotiations in response to the Ripps' notice of their exercise of the option to purchase. The Ripps contend the court erred in concluding that the December 23, 1998 and January 5, 1999 letters from the Sayres' counsel did not satisfy the waiver-in-writing requirement of the lease.

¶13 We will assume without deciding that the Ripps' construction of the term provision is correct and that the lease was in effect from February 1, 1998 to January 31, 1999. We therefore focus on the issue whether the two letters from the Sayres' counsel satisfied the following lease provision:

> *No Waiver*. The waiver by either party of any breach of or default in any term, covenant or condition herein contained shall not be deemed to be a waiver of such term, covenant or condition. No covenant, term, or condition of this lease shall be deemed to have been waived by Landlord or Tenant unless such waiver be in writing.

¶14 When we construe a contract, we attempt to ascertain the intent of the parties as expressed in the contract language. *See* ***Kernz v. J.L. French Corp.***, 2003 WI App 140, 266 Wis. 2d 124, ¶9, 667 N.W.2d 751. If the language is plain, we apply that plain language as the expression of the parties' intent. *See* ***id.*** Whether contract language is plain or ambiguous is a question of law, subject to our de novo review, as is the meaning of plain contract language. ***Lynch v.***

Crossroads Counseling Center, Inc., 2004 WI App 114, 275 Wis. 2d 171, ¶19, 684 N.W.2d 141.

¶15 We conclude the language of the waiver provision plainly requires that a party must state in writing that the party is waiving a particular term or condition of the lease in order for there to be a waiver of that term or condition.[5] The two letters at issue here do not do that. The December 23, 1998 letter states:

> Tom Sayre advised me that he is waiting for your proposal concerning the purchase of the property.
>
> As a part of the purchase, you will be required to pay the back harvestor rent and to repay the $15,000.00 loan less the $1,500.00 payment plus interest.
>
> Please let me know when you can close on the transaction, and we will provide you with a payout as to the amount due and owing.

The January 5, 1999 letter first informs James Ripp of a cancellation notice for insurance on the property and of the requirement in the lease that the Ripps maintain that insurance and then states:

> I also need you to contact me as soon as possible to set up a time where we can meet to discuss the future of the farm. As you know, Tom Sayre gave you notice back in September as to the termination of the lease agreement.
>
> You indicated in your letter of November 13, 1998, that you were going to exercise the option. We need to meet to discuss the exercise of that option to determine the fair market value.
>
> If a fair market value cannot be agreed upon, then appraisals will have to be done and we need to go through that procedure.

[5] The meaning of the first sentence of the waiver provision is not clear, but the ambiguity does not affect the meaning of the second sentence.

> Communication between a landlord and tenant is absolutely essential, and we have not had much communication from you.

There is no mention in either letter of the time restriction in the lease for the option to purchase and no statement that the Sayres are waiving that restriction.

¶16 The Ripps argue that the two letters satisfy the lease provision because they are in writing and they show that the Sayres were acting on the Ripps' exercise of the option to purchase. According to the Ripps, by responding to their notice without mentioning the time limit, the Sayres indicated an intent to waive the time limit. We do not agree. The evident purpose of the provision that "[n]o … term … shall be deemed to have been waived by the Landlord or Tenant unless such waiver is in writing" is to minimize both waivers and disputes over waivers by requiring a specified method for an effective waiver. The Ripps' construction of the provision is inconsistent with that purpose as expressed in the plain language. Because the letters do not expressly state they are waiving the 120-day time limit for the Ripps' exercise of the option to purchase, the Ripps infer that intent. We agree the letters are consistent with an intent to waive the time limit. However, they are also consistent with an intent *not* to waive the time limit in writing as required by the contract, but to entertain the Ripps' offer to purchase if and so long as it is in the Sayres' interests to do so. A dispute over this type of ambiguity regarding the Sayres' intent is precisely what the plain language of the waiver provision avoids.

¶17 We conclude, as did the circuit court, that the two letters did not comply with the waiver provision in the lease. Therefore, even if the Ripps are correct that the lease was in effect from February 1, 1998 to January 31, 1999, the

undisputed facts show that the November 13, 1998 exercise of the option was untimely.

¶18 We turn next to James Ripp's September 24, 2004 letter stating that he was exercising the option to purchase. The Ripps argue that, even if they did not properly exercise the option in 1998, this letter was a valid exercise of the option because it was sent before 120 days of the end of the lease term on January 31, 2005. The Ripps' position is the lease was still in effect in 2004, or should be on equitable grounds, because of the Sayres' conduct after the Sayres' "attempted termination" of the lease in September 1998.

¶19 We conclude that the undisputed facts show that the lease was not in effect in 2004. It is undisputed that the Sayres gave written notice that they were terminating the lease more than four months before the end of the lease term on January 31, 1999. If a tenant continues to occupy the premises after a lease has terminated, a landlord may elect to hold the tenant to the terms of the lease. *See* WIS. STAT. § 704.25(2). Such a tenancy is "upon the same terms and conditions as those of the original lease except that any right of the tenant to renew or extend the lease, or to purchase the premises … does not carry over to such a tenancy." Section 704.25(3). The Sayres' conduct in allowing the Ripps to stay on and adhering to the financial terms of the lease such as payment structure, insurance arrangements, and accounting is expressly recognized in the statute as a feature of a holdover tenancy, at the landlord's option. That conduct, therefore, cannot logically convert a holdover tenancy back into a lease agreement that gives the tenant the right to renew or extend the lease or purchase the property.

¶20 The Ripps also point to the fact that the notice the Sayres gave them in September 2004 stated that the "year-to year *lease* … will not be renewed for

the year 2005…." (Emphasis added.) This shows, the Ripps argue, that the Sayres acted as though there was still a lease, and they believed the Sayres: that is why they exercised the option to purchase shortly thereafter. This argument is undeveloped and without legal authority. We conclude there is no merit to the argument that, solely by using the word "lease" in this context, the Sayres transformed the relationship from a holdover tenancy to a lease.

¶21 The Ripps also make equitable arguments to support their position that the lease, including the option to purchase, was still in effect in 2004. They rely both on the common law doctrine of equitable estoppel and on the statutory grounds for equitable relief in real estate transactions under WIS. STAT. § 706.04.[6]

[6] Under the common law doctrine of equitable estoppel, the party asserting estoppel must established four elements: (1) action or non-action; (2) on the part of the party against whom estoppel is asserted; (3) which induces reasonable reliance there on by the other party, either in action or non-action; and (4) which is to his or her detriment. ***Milas v. Labor Ass'n of Wis., Inc.***, 214 Wis. 2d 1, 11-12, 571 N.W.2d 656 (1997).

WISCONSIN STAT. § 706.04 provides:

> **Equitable relief**. A transaction which does not satisfy one or more of the requirements of s. 706.02 may be enforceable in whole or in part under doctrines of equity, provided all of the elements of the transaction are clearly and satisfactorily proved and, in addition:
>
> **(1)** The deficiency of the conveyance may be supplied by reformation in equity; or
>
> **(2)** The party against whom enforcement is sought would be unjustly enriched if enforcement of the transaction were denied; or

(continued)

The factual basis for the Ripps' equitable arguments for the lease being in effect in 2004 is the same as that for the legal arguments we have rejected in the preceding two paragraphs: (1) after January 31, 1999, the Sayres allowed the Ripps to stay on and adhered to the financial terms of the lease; and (2) the "year-to-year lease …" language in the Sayres' September 2004 notice.

¶22 We first observe that it appears that the Ripps did not argue either common law equitable estoppel or WIS. STAT. § 706.04 in the circuit court. Although James Ripp's affidavit states that the wording of the Sayres' September 2004 notice "estops" the Sayres from claiming the lease was not in effect in 2004, the Ripps' brief in the circuit court did not argue any equitable estoppel theory or refer to § 706.04. Because the record does not contain a transcript of the parties' arguments at the hearing on the Sayres' motion, we cannot conclusively rule out the possibility that the Ripps made an equitable estoppel or § 706.04 argument at that time. However, the court's oral decision rendered directly following the

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> **(3)** The party against whom enforcement is sought is equitably estopped from asserting the deficiency. A party may be so estopped whenever, pursuant to the transaction and in good faith reliance thereon, the party claiming estoppel has changed his or her position to the party's substantial detriment under circumstances such that the detriment so incurred may not be effectively recovered otherwise than by enforcement of the transaction, and either:
>
> (a) The grantee has been admitted into substantial possession or use of the premises or has been permitted to retain such possession or use after termination of a prior right thereto; or
>
> (b) The detriment so incurred was incurred with the prior knowing consent or approval of the party sought to be estopped.

parties' argument is on the record and does not refer to any such argument, nor does the court's later written decision.[7]

¶23 Even if we overlook this likely waiver and address the Ripps' arguments on common law equitable estoppel and WIS. STAT. § 706.04, we conclude the Ripps are not entitled either to summary judgment or to a trial on these theories. As noted above, the conduct of the Sayres between January 31, 1999 and the Sayres' September 3, 2004 notice that the Ripps assert led them to believe the lease continued in effect is the very conduct—adhering to the financial terms of the lease—that is permitted a landlord under WIS. STAT. § 704.25(3) after a lease has terminated. The Ripps do not develop an argument explaining how their reliance on that permissible conduct reasonably led them to believe that the lease was still in effect, nor do they point to any other specific conduct of the Sayres on which they claim they reasonably relied to their detriment—except the wording of the September 3, 2004 notice. However, the Ripps could not logically have relied on the wording of that notice before September 3, 2004, and they do not explain how any reasonable reliance on that wording after September 3, 2004 was to their detriment.

[7] The Sayres moved to strike portions of the Ripps' appellate brief, including the portion on equitable estoppel and WIS. STAT. § 706.04, on the ground that these issues were not identified in the docketing statement and the circuit court did not address them. We denied the motion, explaining that there is no such requirement of the contents of the docketing statement and that a party is not necessarily precluded from raising issues on appeal because the circuit court did not address the issue. However, we stated in our order that the Sayres could make these points in their responsive brief if relevant. The Sayres repeat in their responsive brief their position that we should not address certain portions of the Ripps' brief, including the argument on equitable theories, because the circuit court did not address them. However, the Sayres do not tell us whether the Ripps presented these arguments in the circuit court. In order to avoid waiving the right to raise an issue on appeal, a party must raise it in the circuit court. ***Cashin v. Cashin***, 2004 WI App 92, 273 Wis. 2d 754, ¶26, 681 N.W.2d 255. This preserves an issue for appeal even if the circuit court did not address the issue.

¶24 The Ripps' equitable arguments are flawed in another respect. They assert that the lease was entered into with the intention that they would be able to buy back their farm and, therefore, all the investments they made in the farm were in reliance on their right to exercise the option to purchase. However, the lease provides in the accounting section: "Tenant shall also be entitled to credits or reductions upon the balance due and owing upon the said accounting for any and all capital improvements to the Farm undertaken in accordance with this Agreement, but *only in the event Tenant does not exercise the option … [to purchase]*." (Emphasis added.) Thus, the lease expressly contemplates that the Ripps might not purchase the farm, and, in that event, they would be entitled to an adjustment if one was due. The issue of what is owed between the parties is not before us. *See supra* at note 4.

CONCLUSION

¶25 With respect to the November 1998 notice, we conclude based on the undisputed facts that, even if the lease was in effect at that time, the notice was not within the time period required by the lease and the Sayres did not waive that time restriction in writing as required by the lease. With respect to the September 2004 notice, we conclude, based on the undisputed facts, that the lease was no longer in effect at that time. Accordingly, we affirm the circuit court's order granting summary judgment in the Sayres' favor and dismissing the complaint.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.