

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 8, 2007

A. John Voelker
Acting 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. 2005AP3091

Cir. Ct. No. 2005SC9685

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

44 ASSOCIATES LIMITED PARTNERSHIP,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

V.

CAPITAL FITNESS, L.L.C. AND ERIK MINTON,

DEFENDANTS-APPELLANTS-CROSS-RESPONDENTS.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Dane County: DANIEL L. LaROCQUE, Reserve Judge. *Affirmed and cause remanded with directions.*

Before Lundsten, P.J., Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. Capital Fitness, L.L.C., and its owner Erik Minton (collectively, Capital Fitness or the tenant) appeal a judgment of eviction from a commercial property owned and operated by 44 Associates Limited Partnership

(44 Associates or the landlord). Capital Fitness challenges the trial court's determination that it breached its lease by failing to provide proper maintenance and repair of the premises. 44 Associates cross-appeals the trial court's determination that Capital Fitness did not breach the contract by failing to continuously operate as an athletic club and by failing to provide four monthly athletic club memberships to 44 Associates. We affirm the judgment of eviction on the ground that Capital Fitness failed to provide the four required monthly memberships, and remand to have the trial court consider the issue of damages.

BACKGROUND

¶2 We accept the following facts found by the trial court because the court's findings are not clearly erroneous. *See generally* WIS. STAT. § 805.17(2) (2005-06).¹ In 2000, Capital Fitness acquired the business and assets of a former fitness club competitor who was a tenant of 44 Associates located on the Capitol Square in Madison. The Capitol Square facility was a full-service fitness center, providing "a variety of aerobic and athletic equipment, weights, a steam room, tanning facilities, a sauna, a hydrotherapy pool, classes in spinning, aerobics, Pilates, yoga, and personal trainers" to members of both genders. Capital Fitness allowed its members to use either its original facility or its newly acquired Capitol Square facility.

¶3 Capital Fitness also arranged to take over the lease for the Capitol Square premises, and subsequently negotiated a few modifications with 44 Associates. The amended lease in effect at the time of the events at issue on

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

this appeal provided that the “Tenant shall use and occupy the Premises” as an “Athletic club” and, in addition to monetary rent, provide the landlord with four “full memberships to the athletic club to be operated by Tenant within the Premises.” The parties intended the term “athletic club” to refer to the type of full-service facility that was already being operated on the premises at the time of the lease assignment and subsequent modifications.² The agreement to pay the specified rent was “declared to be an independent covenant on the part of Tenant to be kept and performed” with no offset permitted. The lease further provided that the tenant would have thirty days to cure any breach.

¶4 On June 10, 2005, Capital Fitness informed its members that it would be closing the Capitol Square facility. When 44 Associates complained that closing the facility would breach the lease, Capital Fitness responded that it would continue to make rent payments and operate the premises as “an exercise facility,” but that it would not continue to operate with weights and full services. Capital Fitness closed the Capitol Square facility from July 1, 2005, to August 8, 2005, and auctioned off much of the equipment. On August 4, 2005, 44 Associates served notice of default and breach and right to cure.

² Although the construction of a contract is generally a question of law, when a contract is reasonably susceptible to more than one interpretation, it is ambiguous, and the parties’ intent becomes a question of fact. See *Patti v. Western Mach. Co.*, 72 Wis. 2d 348, 353, 241 N.W.2d 158 (1976). Because we agree with the trial court that the term “athletic club” could reasonably be interpreted to mean either a full-service facility open to both genders or a more specialized facility, we treat the court’s evaluation of the extrinsic evidence as to the parties’ intent as a question of fact. The court’s determination that the parties were referring to a full-service facility open to both genders is not clearly erroneous because it is supported by the fact that a full-service facility was already on the premises when the lease was renegotiated, the parties had discussed upgrades to that facility rather than downsizing it, and the landlord’s reason for wanting the memberships in the first place was to be able to mingle with other tenants and prospective tenants in the building.

¶5 On August 8, Capital Fitness reopened the Capitol Square facility as the “Women’s Facility at Capital Fitness,” but provided almost no public advertising for the reopening. Female members who tried the reopened facility reported that it was understaffed, poorly equipped, and practically vacant. The sauna no longer worked, the Jacuzzi had been drained, and clocks, mirrors, televisions, drink machines, and amenities in the shower rooms had been removed. The Capital Fitness manager and assistant manager both conceded that the facility was not ready to reopen due to uncertainty over the lease situation. On September 6, the landlord served notice of termination of the tenancy.

DISCUSSION

¶6 In its cross-appeal, 44 Associates contends that Capital Fitness breached its obligation to pay rent when it stopped providing the landlord with four “full memberships to the athletic club ... within the Premises” by first closing the facility, and then reopening it in a greatly reduced capacity. Capital Fitness does not dispute that it failed to provide the landlord memberships to a full-service facility that could be used on the premises by members of either gender after June 30, 2005. Capital Fitness maintains, however, that it was not required to do so. Instead, Capital Fitness argues that the lease should be interpreted as requiring that Capital Fitness provide such memberships only for so long as it continued to operate as a full-service facility. According to Capital Fitness, 44 Associates’ argument conflicts with the holding in *Sampson Investments v. Jondex Corp.*, 176 Wis. 2d 55, 499 N.W.2d 177 (1993), that a lease requiring continuing use must be express in that regard.

¶7 We conclude that *Sampson Investments* is inapposite. In *Sampson Investments*, the court construed a provision stating that “[t]he premises shall be

occupied and used only for [a certain specified] purpose” as restricting the premises to the use specified, but not mandating continuous use in the absence of an express continuous use clause. *Id.* at 61-71. The lease clause at issue here is different. We are not dealing with a mere use clause, but rather a rent provision expressly stating that the tenant shall provide the landlord with four full memberships to an athletic club on the premises each month. Thus, to comply with the rent clause, the tenant needed to continue to operate some form of an athletic club in order to provide the promised memberships. Regardless whether the lease otherwise required continuous operation of the business, compliance with the rent clause required an ongoing athletic club.

¶8 Capital Fitness does not respond to 44 Associates’ rent argument beyond its misplaced reliance on *Sampson*. It does not argue that the membership requirement is not part of its obligation to pay rent and does not otherwise argue that it did not breach the rent requirement. Thus, we could end our discussion here. Nonetheless, we observe that when a tenant fails to convey the full rent agreed upon in a timely fashion, and when the landlord does not accept as rent something less than what is specified in the lease, it is not apparent why such a tenant has not breached the lease.

¶9 In addition, if we applied case law defining a material breach, we would reach the same conclusion. A breach is material when it is “so serious ... as to destroy the essential objects of the contract.” *Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.*, 206 Wis. 2d 158, 183, 557 N.W.2d 67 (1996) (citation omitted). Considerations relevant to the materiality determination include “the extent to which the injured party will be deprived of the benefit that he or she reasonably expected, and the extent to which the injured party can be

adequately compensated for his or her loss.” *Id.* at 184 (citing RESTATEMENT (SECOND) OF CONTRACTS §§ 241, 242 (1981)).

¶10 Here, we are persuaded that the breach of the rent provision was material. First, the lease provided that the rent provision was an independent covenant. Second, the athletic club use clause underscored the role of the membership portion of the rent provision as important to the landlord. Third, Capital Fitness does not dispute that male members of the landlord’s group were completely deprived of their expected benefit when the club was designated a women’s facility. One of those benefits was socializing with tenants and prospective tenants, and providing athletic club memberships at Capital Fitness’s other location was not a reasonable substitute.

¶11 Furthermore, as we explained in footnote 2 above, we accept the trial court’s factual determination that the parties intended the term “athletic club” to refer to a full-service facility that would be open to both genders, so that the landlord could socialize with tenants and prospective tenants in the building. We therefore conclude that provision of memberships to a female-only facility on the premises and/or the tenant’s remaining full-service facility off the premises failed to satisfy the rent provision of the lease requiring four monthly athletic club memberships on the premises.

¶12 Accordingly, we affirm the judgment of eviction. However, since the order underlying the judgment of eviction did not address damages, apparently at the request of the parties for a bifurcated proceeding, we remand to have the trial court consider damages.

By the Court.—Judgment affirmed and cause remanded with directions.

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

