COURT OF APPEALS
DECISION
DATED AND FILED

December 15, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP841 **Cir. Ct. No. 2009CV2832**

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

SUN-P ENTERPRISES, LLC,

PLAINTIFF-RESPONDENT,

V.

JBECK PIZZA LLC AND JEREMY S. BECK,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Dane County: AMY SMITH, Judge. *Affirmed in part, reversed in part, and cause remanded for further proceedings.*

Before Vergeront, Higginbotham and Blanchard, JJ.

¶1 VERGERONT, J. Sun-P Enterprises, LLC, filed this action against JBeck Pizza LLC and Jeremy S. Beck alleging breach of a commercial property lease agreement and alleging that Beck personally guaranteed the lease. The

circuit court granted Sun-P's motion for summary judgment against both JBeck Pizza and Beck, and both appeal. Beck contends the circuit court erred in granting summary judgment against him because, he asserts, it is undisputed that he did not personally guarantee the lease, or, alternatively, there are issues of fact whether he personally guaranteed the lease. Both JBeck Pizza and Beck contend that summary judgment is improper because there are disputed issues of fact regarding the reasonableness of Sun-P's efforts to mitigate its damages.

¶2 We agree with the circuit court that, based on the undisputed facts, Beck personally guaranteed JBeck Pizza's obligations under the lease. However, we do not agree with the circuit court that the issue of the reasonableness of Sun-P's efforts to mitigate damages is properly resolved on summary judgment. Instead, we conclude that factual disputes require a trial on this issue. Accordingly, we affirm in part, reverse in part, and remand for further proceedings.

BACKGROUND

¶3 Many of the relevant facts are undisputed. JBeck Pizza LLC entered into a three-year commercial lease agreement with property owner Brian Carey to lease a building and land in Sun Prairie for a restaurant. Later, Carey assigned the lease to Sun-P Enterprises, LLC.

¶4 The terms of the lease provide for monthly rental payments from November 2006 to November 2009. From August 2008 through November 2009, JBeck Pizza failed to pay rent and utilities as required by the terms of the lease. Sun-P sued JBeck Pizza and Beck to recover the amounts owed, alleging that Beck had personally guaranteed JBeck Pizza's obligations under the lease. In answer to the complaint, Beck denied that he personally guaranteed the lease, and both Beck

and JBeck Pizza raised the affirmative defense that Sun-P failed to make reasonable efforts to mitigate its damages.

¶5 Sun-P moved for summary judgment, and the circuit court granted the motion. The circuit court concluded the lease was unambiguous and Beck's signature made Beck personally liable on the lease as a guarantor. Regarding mitigation of damages, the court concluded that, as a matter of law, Sun-P's efforts to re-rent the premises were reasonable.

DISCUSSION

¶6 JBeck Pizza and Beck renew on appeal their arguments in opposition to Sun-P's motion for summary judgment. Beck contends that it is undisputed that he did not personally guarantee the lease, or, alternatively, that there are issues of fact whether he personally guaranteed the lease. Both Beck and JBeck Pizza contend that issues of fact preclude summary judgment on the reasonableness of Sun-P's attempts to mitigate its damages.

¶7 We review a circuit court's grant of summary judgment de novo, applying the same methodology as the circuit court. ***Green Springs Farms v. Kersten***, 136 Wis. 2d 304, 314-16, 401 N.W.2d 816 (1987). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." WIS. STAT. § 802.08(2) (2009-10).[1] In deciding

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

whether there are any factual disputes, the court is to consider whether more than one reasonable inference may be drawn from undisputed facts; if so, the competing reasonable inferences may constitute a genuine issue of material fact. ***H&R Block E. Enters., Inc. v. Swenson***, 2008 WI App 3, ¶11, 307 Wis. 2d 390, 745 N.W.2d 421. Whether an inference is reasonable and whether more than one reasonable inference may be drawn are questions of law, which we review de novo. *See* ***Pum v. Wisconsin Physicians Serv. Ins. Corp.***, 2007 WI App 10, ¶6, 298 Wis. 2d 497, 727 N.W.2d 346 (citations omitted).

I. Beck As Guarantor

¶8 We first address Beck's contention that he did not personally guarantee the lease, or, alternatively, that issues of fact preclude summary judgment on whether he personally guaranteed the lease. For the following reasons we reject Beck's arguments and affirm the circuit court on this issue.

¶9 Section thirty-three of the lease agreement contains a guaranty clause, which provides in part:

> As an inducement for Lessor to enter into this Lease, the individual guarantors (Individual Guarantors) … personally guarantee the full, prompt and unconditional payment, when due, of any rent and the full and prompt performance of and observance by Tenant of each and every term, covenant, promise, agreement or condition to be performed as set forth above in the Lease.

This is the last section in the lease, and it is followed by the signatures of Brian Carey and Jeremy Beck. Because the preprinted designations of the parties and the locations of the signatures are important to Beck's argument, we describe them in detail.

¶10 At the bottom of the second-to-the-last page of the lease, immediately following the guaranty clause in section thirty-three, the term "Lessor" appears in typeface, under which, in typeface, is the phrase, "By: Brian Carey." Under this phrase is a signature line with a signature that appears to be that of Brian Carey. At the top of the next, and last, page of the lease, "Tenant" appears in typeface under which, in typeface, is the phrase, "By: JBeck Pizza LLC." There is no signature line directly under this phrase, although there is a space. Below the space, in typeface, appears the term "GUARANTORS." Under "GUARANTORS," there are two lines that are each preceded by a typeface "By." The first line, under the term "GUARANTORS," contains the signature of Jeremy Beck, and the second line, below that, is blank.

¶11 Beck makes two alternative arguments in support of his contention that the circuit court erred in concluding that, based on the undisputed facts, he personally guaranteed the lease. First, Beck contends his signature, which appears only once on the document, unambiguously reflects that he signed the lease only in his capacity as a representative of JBeck LLC. He contends that, in order for him to personally guarantee the lease, his signature would need to be on the document twice—once in a representative capacity binding the company to the terms of the lease and then separately to provide his own personal guaranty of the company's obligations under the lease.

¶12 In the alternative, Beck contends that, if his signature does not unambiguously indicate that he signed only in his representative capacity, then the capacity in which he signed is ambiguous and the circuit court should have considered his affidavit. In his affidavit, he avers that his signature on the lease was intended to indicate that he was signing in his capacity as a representative of the LLC.

¶13 For the following reasons, we reject both arguments and conclude that Beck's signature is unambiguously a signature in his individual capacity.

¶14 The lease plainly states in section thirty-three that "[a]s an inducement for Lessor to enter into this Lease, the individual guarantors (Individual Guarantors) … personally guarantee the full, prompt and unconditional payment, when due, of any rent …." From this language, a reasonable person would understand that, if he or she signed under the term "GUARANTORS," then he or she would be personally guaranteeing the lessee's obligations under the lease agreement. A reasonable person would understand that, despite the fact that the representative of the lessee signed the document only once, under the term "GUARANTORS," that signature would be sufficient to bind the lessee and the personal guarantor to the terms of the lease. Given the plain language in section thirty-three, just preceding the signature lines, it is not reasonable for a person representing the lessee to believe that by signing under "GUARANTORS" he or she is entering into a valid lease on behalf of the lessee but is not personally guaranteeing the lessee's obligations under the lease.

¶15 Nothing in the way Beck signed his name is contrary to the conclusion that Beck personally guaranteed the lease. Specifically, Beck's signature is under the term "GUARANTORS" and does not indicate in any way that he signed in a representative capacity only. For example, he did not add "member" or "owner" after his signature. Thus, the facts here are not like those in ***Liebscher v. Kraus***, 74 Wis. 387, 43 N.W. 166 (1889), on which Beck relies. In ***Liebscher*** the court concluded that the president of a company signed only in his representative capacity because after his signature he added the word "President." ***Liebscher***, 74 Wis. at 390. The court applied the general rule that, "if the agent sign[s] the note with his own name alone, and there is nothing on the face of the

note to show that he was acting as agent, he will be personally liable; but if his agency appears with his signature, then his principal only is bound." ***Id.*** Here, not only is there nothing to indicate Beck's agency, but he signed directly under "GUARANTORS."

¶16 In support of his ambiguity argument, Beck relies on ***Germania National Bank of Milwaukee v. Mariner***, 129 Wis. 544, 109 N.W. 574 (1906); but this case, too, is readily distinguishable on the facts. In ***Germania,*** the secretary of a corporation signed a note under the signature of the treasurer of the corporation, and both signatures were under the name of the corporation, Northwestern Straw Works. ***Id.*** at 545. The signature of the treasurer was followed by "Treas.," but the signature of the secretary was not followed by any title. ***Id.*** The contents of the note specifically identified Northwestern Straw Works as the promisor, and did not anywhere state "I" or "we" promise to pay. ***Id.*** at 546. The court concluded it was ambiguous whether the secretary was signing as an individual or in a representative capacity and so admitted evidence on this issue, ultimately concluding the secretary was signing in his representative capacity. ***Id.*** at 547-48. In contrast to the facts in ***Germania***, Beck signed under the word "GUARANTORS" and the immediately preceding section of the lease plainly required a personal guaranty. The only reasonable way to read Beck's signature in the context of section thirty-three and the location of his signature is that he was signing individually as a guarantor. Thus, there is no ambiguity that would allow the consideration of extrinsic evidence.

II. Sun-P's Efforts to Mitigate Damages

¶17 Beck and JBeck Pizza contend that the circuit court erred when it concluded, as a matter of law, that Sun-P's efforts to re-rent the premises were reasonable. They contend they are entitled to a trial on this issue.

¶18 WISCONSIN STAT. § 704.29(2)(b) requires that "[i]n any claim against a tenant for rent and damages, or for either, the amount of recovery is reduced by the net rent obtainable by reasonable efforts to rerent the premises." Section 704.29(2)(a) provides that "'reasonable efforts' mean those steps that the landlord would have taken to rent the premises if they had been vacated in due course, provided that those steps are in accordance with local rental practice for similar properties." The landlord "must allege and prove that the landlord has made efforts to comply with this section," while the tenant has the "burden of proving that the efforts of the landlord were not reasonable." § 704.29(3).

¶19 In support of its motion for summary judgment, Sun-P submitted the affidavit of Vito Cerniglia, the managing member of Sun-P. Cerniglia avers that after JBeck Pizza vacated the premises, Sun-P made various efforts to re-rent the premises, including showing the property to five prospective tenants, identified by name; posting "For Rent" signs; advertising on "Craig's List"; and "offering single-party listings to various realty companies." Cerniglia states that Sun-P's efforts were a reasonable effort to mitigate damages.

¶20 In response, JBeck Pizza and Beck submitted the affidavit of Jeffrey M. Fuller, who offers his opinion on the reasonableness of Cerniglia's efforts to mitigate Sun-P's damages, based on the information in Cerniglia's affidavit. Fuller avers that he is a residential and commercial real estate broker and has worked in the Sun Prairie market for approximately twenty-one years. In addition,

he avers, he has developed, owns, and has managed for ten years a "business incubator" property with twenty commercial spaces. Fuller opines that Sun-P did not use reasonable efforts to re-rent the property at issue. He states that reasonable efforts to re-rent the property would have included listing the property with a commercial real estate broker at a compensation rate that would have been competitive on the market, and he explains why, in his opinion, a one-party listing is not a reasonable way to rent commercial space. Fuller also states that Sun-P should have undertaken more extensive advertising, and, in particular, should have advertised the property on at least two online sites, which he names. Finally, Fuller states that the property should have been listed so as to have access to the multiple listing service. In his view, this is "absolutely crucial" because it "would have informed approximately one thousand commercial real estate agents in Wisconsin that the property was available for rent."

¶21 JBeck Pizza and Beck do not argue on appeal that Cerniglia's affidavit is insufficient to establish a prima facie case that Sun-P made efforts to comply with WIS. STAT. § 704.29. *See* ***Swatek v. County of Dane***, 192 Wis. 2d 47, 62, 531 N.W.2d 45 (1995) (explaining that on review of a grant of summary judgment, after determining the pleadings set forth a claim for relief, "our inquiry shifts to the moving party's affidavits or other proof to determine whether a prima facie case for summary judgment has been presented" (citation omitted)). Therefore, we assume without deciding that Cerniglia's affidavit is sufficient to establish a prima facie case that Sun-P made efforts to comply with § 704.29. The inquiry, then, is whether Fuller's affidavit is sufficient to establish a genuine issue of material fact on the reasonableness of Sun-P's efforts to re-rent the premises. *See* ***id.*** ("If the moving party has made a prima facie case for summary judgment,

we then examine the affidavits and other proof of the opposing party to discern whether there 'exist disputed material facts ….'" (citation omitted)).

¶22 We conclude Fuller's affidavit creates a genuine issue of material fact as to whether Sun-P's efforts to mitigate its damages were reasonable, that is, were in accordance with the local rental practice for re-renting similar properties. *See* WIS. STAT. § 704.29(2)(a). Fuller's affidavit shows that by experience he has a basis for knowledge about the commercial real estate market in Sun Prairie, where the property is located; his opinion is directed to the specific property at issue; and he identifies specific additional steps he believes Sun-P should have taken as part of a reasonable effort to re-rent the property. A reasonable jury could credit Fuller's opinion, could infer that he is describing what is reasonable with reference to the local practice for properties similar to the one at issue, and could decide that Sun-P's efforts were not reasonable because they were not in accordance with that practice.

¶23 The circuit court's conclusion that Cerniglia's efforts were reasonable is based on an incorrect application of summary judgment methodology. The court stated that, while it "respect[ed] Mr. Fuller's opinion," Cerniglia had taken specific steps during "an admittedly difficult economic climate" and the fact that "other more expensive or more involved advertising avenues might exist is not dispositive on whether [Sun-P's] efforts in this instance were reasonable."

¶24 It could be that the court means that Fuller's description of reasonable efforts to re-rent entails more than "local rental practice for similar properties," which is the standard under WIS. STAT. § 704.29(2)(a). If so, the court is not drawing the reasonable inferences from the evidence in the non-

moving parties' favor, as the case law requires. While it may be reasonable to infer that Fuller is describing best practices for commercial real estate generally rather than local practice for similar properties, that is not, as we have already concluded, the only reasonable inference from his affidavit.

¶25 If, on the other hand, the circuit court recognizes that there are competing reasonable inferences but is choosing among them, that is not the role of the circuit court on summary judgment. Choosing between conflicting reasonable inferences, like assessing credibility and weighing evidence, is the role of the fact finder; it is not the role of the circuit court on summary judgment. *See* ***Fortier v. Flambeau Plastics Co.***, 164 Wis. 2d 639, 665, 476 N.W.2d 593 (Ct. App. 1991).

¶26 Sun-P's argument on appeal is similar to the circuit court's reasoning. Sun-P argues that "[t]he property at issue in this case yields a relatively low rental value" and "is a relatively small space," and while it may be reasonable under certain circumstances to list properties with a broker, according to Sun-P, its circumstances are different and it is not unreasonable for Sun-P to "take a different course."[2] However, arriving at this conclusion requires choosing between conflicting reasonable inferences or weighing the evidence or both. This is not appropriate on summary judgment.

¶27 Because we conclude there is a factual dispute about whether Sun-P's efforts to re-rent the property were in accordance with the local rental practice

[2] The lease states that the initial annual rental was $34,800, with a three percent increase annually, plus certain additional payments and obligations; the restaurant space leased is 1800 square feet.

for re-renting similar properties, we reject Sun-P's argument that the reasonableness of its efforts to mitigate damages presents a question of law. Sun-P cites ***Langreck v. Wisconsin Lawyers Mutual Insurance Co.***, 226 Wis. 2d 520, 524, 594 N.W.2d 818 (Ct. App. 1999), among other cases, for this proposition, but also acknowledges, correctly, that in ***Langreck*** there were no facts in dispute. Moreover, because the term "reasonable efforts" is specifically defined in WIS. STAT. § 704.29(2)(a) to mean "those steps that the landlord would have taken to rent the premises if they had been vacated in due course, provided that those steps are in accordance with local rental practice for similar properties," we need not consider case law involving a general "reasonableness" standard. None of the cases Sun-P cites on the nature of the determination of reasonableness takes into account the statutory definition applicable here.[3]

CONCLUSION

¶28 The order of the circuit court granting summary judgment in favor of Sun-P is affirmed in part, reversed in part, and remanded for further proceedings.

By the Court.—Order affirmed in part, reversed in part, and cause remanded for further proceedings.

Not recommended for publication in the official reports.

[3] The circuit court cited ***Strauss v. Turck***, 197 Wis. 586, 222 N.W. 811 (1929), for the proposition that "reasonableness in this context is a question of law for the [c]ourt." However ***Strauss*** does not support this proposition. In ***Strauss***, which did not involve WIS. STAT. § 704.29, the supreme court reversed the circuit court's judgment in favor of the landlord because the supreme court concluded there were factual issues regarding whether the landlord made reasonable efforts to mitigate and these should be resolved by a jury. ***Id.*** at 587.