COURT OF APPEALS
DECISION
DATED AND RELEASED

October 1, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-0879

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

Seventh & Michigan Partnership,
a Wisconsin general partnership,
Nancy Pearson and Helen Kissinger,

Plaintiffs-Appellants-
Cross Respondents,

v.

Estate of Sidney Spector and
Jeffrey D. Berlin,
d/b/a Spector and Berlin,

Defendants-Respondents-
Cross Appellants.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Milwaukee County: LOUISE M. TESMER, Judge. *Reversed and cause remanded*.

Before Wedemeyer, P.J., LaRocque and Myse, JJ.

PER CURIAM. This is an appeal from a summary judgment in a case requiring interpretation of a commercial lease. Seventh & Michigan Partnership, Nancy Pearson, and Helen Kissinger (collectively, Seventh & Michigan) appeal from a judgment dismissing their claim for unpaid rent and granting judgment against them on a counterclaim for breach of a lease. The Estate of Sidney Spector and Jeffrey D. Berlin d/b/a Spector and Berlin (Spector and Berlin) obtained the judgment on the counterclaim. Spector and Berlin cross-appeal from the judgment.

Seventh & Michigan contends that the trial court erred when, as a matter of law, it concluded that the lease was ambiguous, determined the intent of the parties, and calculated damages. Spector and Berlin contend that the trial court impermissibly denied prejudgment interest, erroneously concluded that the amount of attorney's fees and expenses requested was unreasonable, and erroneously denied reasonable fees for legal work performed by Berlin. We conclude that there is an issue of material fact regarding the meaning of language used in connection with the lease. Consequently, summary judgment is not appropriate. Therefore, we reverse the judgment and remand the case to the circuit court for further proceedings. Because we reverse the judgment, we do not address the issues raised by Seventh & Michigan regarding calculation of damages or by Spector and Berlin in the cross-appeal.

In 1988, Spector and Berlin leased office space in a building owned by Seventh & Michigan Partnership.[1] The space was unfinished at the time of leasing, and prior to execution of the lease, Renner Architects prepared a blueprint for the Spector and Berlin office suite. The blueprint contained a notation "Rentable Area ..... 1,824 S.F." When the lease was executed, the demised premises were identified as "an area consisting of approximately 1,824 square feet of space in the third floor of the property known as 700 West Michigan Street." The lease also contained the following provision concerning rent:

[1] According to the deposition testimony of Armin H. Nankin, he was the principle of Seventh & Michigan Partnership when Spector and Berlin leased the space. He sold half his interest in 1989 and the remainder in 1993. Pearson and Kissinger acquired Nankin's interest in the partnership.

> A. Base Rent. The Tenant shall pay to the Landlord rent at the rate of $12.00 per square foot for 1,824 square feet of office space for a total of $21,999 per year, payable in advance in equal monthly installments of $1,824 on the first day of each month during the term of this Lease commencing April 1, 1988 ("Base Rent").

After the office suite was finished in accordance with the blueprints, Spector and Berlin took possession of the area, and they remained in possession during the term of the lease.

Near the end of the lease's term, Spector and Berlin were dissatisfied with the amount of their rent, and they investigated office space in other buildings. Their office suite was measured and, according to Berlin's deposition testimony, was found to be 1,408 square feet. Spector and Berlin claimed that, under the lease, the office suite was to contain 1,824 square feet within its walls and that Seventh & Michigan had breached the lease. Spector and Berlin stopped paying rent to recoup what, they believed, were prior overpayments.

Nine months after Spector and Berlin stopped paying rent, Seventh & Michigan filed an action to collect the unpaid rent. Spector and Berlin filed a counterclaim for breach of the lease. Seventh & Michigan denied that it breached the lease. It claimed that "rentable" as used on the blueprint is a term of art within the commercial leasing industry and that it meant the tenant's actual space plus a share of the common areas.

On cross-motions for summary judgment, the trial court ruled that the lease was ambiguous, but that, as a matter of law, the parties intended the square footage figure in the base rent clause to refer to space actually useable by the tenant, i.e., space within the walls of the office suite. The court found that 1,824 square feet overstated the area and inflated the rent.

Summary judgment is used to determine whether there are disputed issues for trial. ***U.S. Oil Co. v. Midwest Auto Care Servs., Inc.***, 150

Wis.2d 80, 86, 440 N.W.2d 825, 827 (Ct. App. 1989). When reviewing a grant of summary judgment, we apply the same methodology as the trial court. ***Id.*** Summary judgment is appropriate when material facts are not disputed and the moving party is entitled to judgment as a matter of law. Section 802.08(2), STATS. The summary judgment process is not a "'short cut to avoid a trial.'" ***State Bank of La Crosse v. Elsen***, 128 Wis.2d 508, 511, 383 N.W.2d 916, 917-18 (Ct. App. 1986) (citation omitted). The party seeking summary judgment bears the burden of showing that there are no issues of material fact. ***Id.*** at 512, 383 N.W.2d at 918. All doubts about factual matters are resolved against the party moving for summary judgment. ***Id.***

The goal of judicial construction of a lease, like a contract, is to determine what the parties agreed to in a legal sense as evidenced by the language they used. ***Sampson Inv. v. Jondex Corp.***, 176 Wis.2d 55, 62, 499 N.W.2d 177, 180 (1993). This may not be the same as what the parties intended to do. ***Id.*** If the terms of the contract are plain and unambiguous, it is the court's duty to construe the contract according to its plain meaning even though the parties may have construed it differently. ***Waukesha Concrete Prod. Co. v. Capitol Indem. Corp.***, 127 Wis.2d 332, 339, 379 N.W.2d 333, 336 (Ct. App. 1985). Where, however, a term in a lease or contract is not defined in the document but has a technical legal meaning, courts apply the accepted technical meaning. *See* ***School Dist. v. Wausau Ins. Co.***, 170 Wis.2d 347, 374-75, 488 N.W.2d 82, 92 (1992).

The issue in this case is whether Seventh & Michigan breached the lease by renting an office suite to Spector and Berlin that contained less than 1,824 square feet within the walls of the suite. It is undisputed that the area of the suite was less than 1,824 square feet, and that the difference represents a share of common areas. The square-footage issue is material because the summary-judgment materials suggest that the parties negotiated the rent based on a cost per square foot and the "base rent" clause states the rent both as an amount per square foot and as a total annual rent. The lease does not contain a definition of the terms "space" or "rentable" or "square footage."

Seventh & Michigan contends that it did not breach the lease because the blueprint identified the square footage as "rentable area" and "rentable," in this context, is a term of art within the commercial leasing industry. In support of its allegation that "rentable" is a term of art, Seventh &

Michigan submitted an affidavit from John T. Gilligan, a commercial lease broker, who represented that office space is marketed as "rentable" or "useable." "Useable" is the space within the walls of a particular tenant's office suite. "Rentable" refers to the tenant's space plus a share of the common areas. Seventh & Michigan also submitted an affidavit from Jeffrey Natrop of Renner Architects, which represented that the calculation of rentable area was made using "BOMA" standards. The affidavit does not define "rentable area" or discuss or further identify "BOMA" standards. In the summary-judgment materials, Berlin denied knowing or being told that "rentable square feet" or "rentable area" had any special significance.

We are satisfied that neither "rentable area" nor "rentable square feet" has an established technical legal meaning. We are unable to find case law adopting the meaning Seventh & Michigan advocates. Legal commentators, while generally recognizing the meaning of "useable area" and "rentable area" advocated by Seventh & Michigan, identify the topic as marked by confusion. *See* Don F. Dagenais, *Space Audits in Commercial Leases: Advice for the Landlord's Attorney*, 52 J.MO. BAR 104, 106-07 (1996); MILTON R. FRIEDMAN, FRIEDMAN ON LEASES § 3.1, at 31-32 (3d ed. 1990); GARY GOLDMAN, DRAFTING A FAIR OFFICE LEASE 105-06 (1989).

The summary-judgment materials submitted by Seventh & Michigan suggest that "rentable area" and "rentable square footage" have a special meaning from industry usage. Usage is an habitual or customary practice, RESTATEMENT (SECOND) OF CONTRACTS § 219 (1979), which may be used to show that clear, unambiguous language in an agreement has a specialized meaning different from its plain meaning, WALTER H. E. JAEGER, WILLISTON ON CONTRACTS § 648, at 6-7 (3d ed. 1961). Usage is relevant to interpretation of a particular contract if both contracting parties knew or had reason to know of the usage and neither knew or had reason to know the other attached a meaning inconsistent with the usage. RESTATEMENT, *supra*, § 220. Whether usage provides a particular meaning and whether both parties knew or should have known of the usage is a question of fact. JAEGER, *supra*, § 649 at 8-9.

Seventh & Michigan's summary-judgment submissions raises an issue of fact regarding whether "rentable area" or "rentable square feet" has a specialized meaning through industry usage. Although Spector and Berlin

claim not to have known of any specialized meaning, whether they should have been aware of it is also an issue of fact. Neither can be resolved on summary judgment, and the lease cannot be construed without resolving these factual issues.

Therefore, we reverse the judgment of the trial court and remand the case for trial. Because we reverse the trial court's judgment, we do not need to consider whether the trial court applied the correct standards in determining damages, denying prejudgment interest, or assessing attorney's fees and costs. *See* ***Gaertner v. 880 Corp.***, 131 Wis.2d 492, 496 n.4, 389 N.W.2d 59, 61 n.4 (Ct. App. 1986) (if decision on one point disposes of appeal, we do not reach other issues raised).

By the Court. – Judgment reversed and cause remanded.

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