COURT OF APPEALS
DECISION
DATED AND RELEASED

August 28, 1996

No. 95-3131

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

RAY FLAHERTY, formerly d/b/a FLAHERTY ENTERPRISES, INC.,

Plaintiff-Appellant,

v.

ERNIE VON SCHLEDORN and MARGARET VON SCHLEDORN,

Defendants-Respondents.

APPEAL from an order of the circuit court for Ozaukee County: JOSEPH D. MC CORMACK, Judge. *Affirmed*.

Before Anderson, P.J., Brown and Nettesheim, JJ.

BROWN, J. Ray Flaherty contends that Ernie and Margaret Von Schledorn breached their lease on commercial property which he owned in Port Washington. He separately contends that even if the Von

Schledorns did not breach the lease, they committed waste and must pay to restore the property.

The circuit court, however, awarded summary judgment to the Von Schledorns after determining that Flaherty breached the lease when he failed to remove leaking underground storage tanks as the lease required. We agree with this interpretation of the lease and further hold that Flaherty constructively evicted the Von Schledorns when he failed to clean up the damage from these tanks as he promised to do in the lease.

Moreover, we conclude that Flaherty may not bring a suit for the cost of returning the property to its original condition. Flaherty understood that the Von Schledorns would renovate the property when he signed the lease. Moreover, the waste he now complains about, the uncompleted renovations, arose out of his failure to cure the tank problem, not from any misconduct by the Von Schledorns.

The parties formed the lease in June 1990 and scheduled it to run through December 1995. The space was formerly used as a car dealership and repair shop. The Von Schledorns intended to update the property for the same use. During renovations, however, the Von Schledorns discovered that some of the underground storage tanks were leaking and had to be removed pursuant to state regulations.

Once the Von Schledorns discovered the tank problem, they sent notice to Flaherty asking that he remove these tanks, as the lease required. After Flaherty failed to take any action, the Von Schledorns eventually abandoned the property in October 1991. Flaherty subsequently responded in November 1993 by filing a breach of contract action seeking lost rent and additional money to repair the damage done during the Von Schledorns' attempt at renovations.

After the Von Schledorns moved for summary judgment, the circuit court ruled that the lease assigned Flaherty the duty to remedy the storage tank problem. The court also concluded that Flaherty breached the lease when he failed to respond to the Von Schledorns' requests.

We first turn to whether the circuit court properly analyzed the lease. The interpretation of a lease, like other written documents, is a question of law and we owe no deference to the circuit court's analysis. *See* ***Schmitz v. Grudzinski***, 141 Wis.2d 867, 871, 416 N.W.2d 639, 641 (Ct. App. 1987).

Flaherty argues that the court erred in its conclusion that he bore the responsibility of removing the storage tanks. Indeed, Flaherty contends that the lease was "silent as to what the remedy would be with regard to any possible leakage of underground storage tanks."

The following language from the lease nonetheless dictates that Flaherty had such a duty and controls the outcome on this issue.

> Landlord represents and warrants that the demised premises presently is in compliance with Environmental Laws and that there are no Hazardous Substances presently in or about the demised premises. *Landlord further agrees that in the event of a breach of the foregoing representation or warranty that the cost of remediation or compliance shall be borne by Landlord.* Landlord shall promptly after demand perform such remediation and compliance as may be necessary. If Landlord fails to perform such remediation and compliance, then *Tenant may perform the same* and offset the costs thereof against next rent due .... [Emphasis added.]

As the Von Schledorns contend, this passage gave Flaherty the duty to remedy the storage tank problem. Indeed, we do not see how the first

passage that we have highlighted could be more explicit. In addition, the parties' decision to use the mandatory word "shall" to express Flaherty's responsibility, and the permissive word "may" to express the Von Schledorns' responsibility, convinces us that only Flaherty was responsible for the clean-up costs. Since Flaherty acknowledges that he was informed of the storage tank problem (he explains that he did not have all the necessary funds), we hold that the circuit court correctly found that Flaherty breached this element of the lease.

We next turn to Flaherty's contention that his breach of the lease was not substantial enough to constitute a constructive eviction and that the Von Schledorns still have an obligation to pay rent. *See* ***First Wis. Trust Co. v. L. Wieman Co.***, 93 Wis.2d 258, 267-68, 286 N.W.2d 360, 364-65 (1980). Pointing to the extensive renovations that the Von Schledorns had begun, Flaherty argues that the leaking underground storage tanks did not materially affect their anticipated use of the property because business was already disrupted. *See* ***id.*** at 268, 286 N.W.2d at 365.

We reject this argument as well. The Von Schledorns did plan extensive renovations to the property. But in the middle of their work, they discovered an environmental problem which singularly barred them from finishing the job. While Flaherty argues that cleaning the site would not have been a "huge inconvenience" considering the extent of what the Von Schledorns

planned to do, the parties' decision to include terms assigning responsibilities for such hazards rebuts his claim. The contract reveals that the parties indeed thought about this issue and decided that it was significant enough to assign specific contingencies. We further observe that the problem of leaking underground storage tanks, contrary to Flaherty's characterization, are enough of a problem in this state that the administrative agencies have devoted several sections of the code to address it. *See generally* WIS. ADM. CODE § NR 705.11 and §§ ILHR 10.50-10.738. We conclude that the leaking tanks presented a significant interruption to the Von Schledorns' use of the property and Flaherty constructively evicted these tenants when he failed to cure the problem. *See* ***First Wis. Trust,*** 93 Wis.2d at 269, 286 N.W.2d at 365.

In addition to the above arguments, we also discern from Flaherty's briefs an equitable argument against enforcing the lease in this manner because it permits the Von Schledorns to use the storage tank problem as an "excuse" to get out of this lease and develop a more suitable site. He acknowledges that the Von Schledorns would have faced up-front expenses to remove the tanks themselves, but he notes that the state has a program to reimburse most of these costs and that he offered to ultimately reimburse the Von Schledorns for any extra costs. He ties up this argument in his reply brief with a citation to ***Market St. Assocs. Ltd. Partnership v. Frey***, 941 F.2d 588 (7th Cir. 1991), and seemingly suggests that the Von Schledorns' request that he fulfill his obligation under the contract, when they knew he was in a precarious financial situation, was a breach of the implied duty of good faith and within

the class of "sharp dealing" that the Seventh Circuit Court of Appeals was critical of. *See* ***id***. at 594.

We reject Flaherty's suggestion that equity requires that we set aside this term of the contract. We base this conclusion on procedural grounds and on the merits.

Regarding procedure, Flaherty first hints at his good faith argument in his reply brief. Our rule against considering arguments raised only in a party's reply brief therefore applies against Flaherty. He has waived his right to pursue this argument. *See* ***Swartwout III v. Bilsie***, 100 Wis.2d 342, 346 n.2, 302 N.W.2d 508, 512 (Ct. App. 1981).[1]

We alternatively reject the merits of Flaherty's claim that the theories discussed in ***Market Street Associates*** applies to this controversy. There, a landlord alleged that its tenant was acting in bad faith by trying to enforce a hidden term of the lease which, on its face, gave the tenant the option to purchase the leased property at below market value. *See* ***Market Street Assocs.***, 941 F.2d at 591-92. The Seventh Circuit concluded that Wisconsin law read into a contract an implied duty of good faith, ***id.*** at 592, and that this duty of good faith possibly prevented the tenant from engaging in what could be termed "opportunistic behavior." *See* ***id.*** at 597.

[1] We also observe that the words "good faith" and citation to the relevant authority are conspicuously absent from Flaherty's brief opposing summary judgment which he filed with the circuit court.

The Seventh Circuit drew a line, however, noting that a party is "not required to spend money bailing out a contract partner who has gotten into trouble." ***Id.*** at 594. But this is precisely what Flaherty expected the Von Schledorns to have done in this case.

The ***Market Street Associates*** panel, moreover, was specifically concerned about long-term contracts, such as leases, where the parties face "unforeseen problems." ***Id.*** at 595 (quoted source omitted). Here, we do not have an unforeseen problem. The parties drafted terms directing how they would handle these situations. As important, the Von Schledorns tried for about a year to get Flaherty to fulfill his obligations. The Von Schledorns' decision not to remedy the problem themselves and to abandon the lease cannot be described as a sudden or unexpected decision. We conclude that the Von Schledorns' actions in this relationship do not fit into that class of conduct which the ***Market Street Associates*** court described as bad faith.

Lastly, we turn to Flaherty's separate claim that the Von Schledorns had a duty to restore the property to its original condition even in light of Flaherty's breach and constructive eviction. Here, Flaherty points to the following language:

> Tenant shall, at its own cost and expense, throughout the demised term, keep and *maintain the entire demised premises in good condition* and repair .... *Tenant shall also use all reasonable precaution to prevent waste, damage or injury to said demised premises.* [Flaherty's emphasis added.]

Flaherty completes his argument with the following statement: "Regardless of anything else, it is clear that the Von Schledorns, during the term of their tenancy, totally destroyed the premises and left them in a total shambles and then, without repairing the damage, unilaterally canceled the Lease."

Nonetheless, we do not agree that the language Flaherty cites required the Von Schledorns to restore the property after Flaherty evicted them. The force of the clause that Flaherty cites is limited by the terms "all reasonable precaution." The lease states that the property will be used for an "automobile dealership." Moreover, the affidavits from the parties show that both parties knew the Von Schledorns would be renovating the property. But, as we noted above, the problems with the tanks interrupted the renovation process. So while Flaherty may believe that the property is currently in disarray or "shambles," we see no evidence in the record demonstrating that the Von Schledorns did not take "reasonable precautions" to prevent this from happening. They acted reasonably when they tried to remedy the tank problem in the manner that the lease specified.

By the Court. – Order affirmed.

Not recommended for publication in the official reports.