



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688

MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT III/IV

June 6, 2013

To:

Hon. Gregory B. Huber
Circuit Court Judge
Marathon County Courthouse
500 Forest St.
Wausau, WI 54403

Diane L. Sennholz
Clerk of Circuit Court
Marathon County Courthouse
500 Forest St.
Wausau, WI 54403

Robert J. Reinertson
William C. Hess
Hess, Dexter, Reinertson & Brunner S.C.
605 Scott Street
P. O. Box 867
Wausau, WI 54402-0867

Timothy H. Posnanski
Whyte Hirschboeck Dudek, S.C.
555 E. Wells St., Ste. 1900
Milwaukee, WI 53202-3837

You are hereby notified that the Court has entered the following opinion and order:

2012AP1265

RBF, LLC v. DDB Limited Partnership (L.C. # 2011CV801)

Before Higginbotham, Sherman and Kloppenburg, JJ.

DDB Limited Partnership appeals the circuit court's order granting summary judgment in favor of RBF, LLC and denying DDB's motion for summary judgment. DDB argues on appeal that the circuit court improperly construed and applied the terms of the commercial lease between the parties. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).¹ We summarily affirm.

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

We review a summary judgment decision by applying the same methodology as the circuit court, and our review is de novo. *Pinter v. American Family Mut. Ins. Co.*, 2000 WI 75, ¶12, 236 Wis. 2d 137, 613 N.W.2d 110. The application of the terms of a commercial lease to a set of facts and the determination of the parties' rights under that lease are also questions of law that we review de novo. *See Westhaven Assocs., Ltd. v. C.C. of Madison, Inc.*, 2002 WI App 230, ¶16, 257 Wis. 2d 789, 652 N.W.2d 819.

DDB is the landlord and RBF is the tenant under a lease executed in 1990 by the parties' predecessors in interest, for property in which RBF operates a supermarket (the "Demised Premises"). Under Article 3 of the lease, there are two categories for payment of rent: Fixed Rent and Percentage Rent. The Fixed Rent equals \$546,000 per year, payable in monthly installments due on the first day of each month during the term of the lease. The Percentage Rent varies in accordance with the tenant's yearly gross retail sales. Article 3(d) of the lease provides that the amount of each quarterly payment of Percentage Rent shall be 1.25% of the gross retail sales exceeding \$26,818,519 "for any Lease Year during the Basic Term and any extended term hereof."

Article 2 of the lease defines the Basic Term as twenty years commencing September 1, 1990 and terminating August 31, 2010, "subject to extension as provided herein." The lease provides for two automatic extensions, each for a duration of five years, unless the tenant gives written notice at least six months prior to the end of the "Basic Term or the initial extended term of five (5) years."

At issue on appeal is the application of Article 3(d)(vi) of the lease, which states that "if, during the term of this Lease," RBF owns and operates a retail food store or supermarket other

than the supermarket on the Demised Premises within the same geographic area, then RBF shall pay a minimum Percentage Rent during the Basic Term at a 6% rate based on an Assumed Sales Schedule. It is undisputed that affiliates of RBF own and operate other food stores in the same geographic area.

RBF asserts that it complied with Article 3(d)(vi) until the Basic Term of the lease ended on August 31, 2010. RBF argues that, because the Basic Term has ended, Article 3(d)(vi) no longer applies and the minimum Percentage Rent is no longer due. DDB disagrees, and argues that RBF continues to owe payment of minimum Percentage Rent to DDB under Article 3(d)(vi) of the lease. DDB takes the position that all of the terms and conditions of the lease, including Article 3(d)(vi), apply equally to the Basic Term and any extended terms. The circuit court agreed with RBF's interpretation of the lease, denied DDB's summary judgment motion, and entered declaratory judgment in favor of RBF.

On appeal, the parties both assert that the lease is unambiguous. We agree. Article 3(d)(vi) states specifically and unambiguously the time period during which a minimum Percentage Rent is to be calculated:

Tenant agrees that if, during the term of this Lease, Tenant ... owns and operates a retail food store or supermarket ... within the trade area ..., then for purposes of calculating Percentage Rent payable hereunder *during the Basic Term* for any Lease Year during which such retail food store or supermarket is owned and operated by Tenant ... shall not be less than the Gross Retail Sales set forth on an Assumed Sales Schedule.

(Emphasis added.) Article 3(d)(vi) then states that, when preparing the Assumed Sales Schedule for a given year, a “compounded rate of 6% for the remaining Lease Years *of the Basic Term*” is to be applied to the Gross Retail Sales for the prior year. The phrase “Basic Term” is defined in

Article 2(a) of the lease as twenty years. Nowhere in Article 3(d)(vi) or elsewhere in the lease do we find support for DDB's argument that the phrase "Basic Term" should be interpreted as including any extensions of the lease.

On the contrary, extensions to the lease are differentiated in the lease from the Basic Term. For example, Article 2(a) defines the Basic Term, while Article 2(b) describes the extension terms as two consecutive five-year periods. Article 4 states that the tenant shall pay certain utilities "during the Basic Term or any renewal or extension thereof." Article 11(b) describes the tenant's option to terminate the lease in the event of fire or other casualty "within the last three (3) years of the Basic Term or any extended term of this Lease."

If, as DDB argues, we were to interpret the phrase "Basic Term" to include extensions of the initial twenty-year lease term, then the phrases "or any renewal or extension thereof" and "or any extended term" would be rendered superfluous. A lease is a contract, and we interpret a contract to give reasonable meaning to each provision and without rendering any portion superfluous. See *Town of Menominee v. Skubitz*, 53 Wis. 2d 430, 435, 192 N.W.2d 887 (1972); *Sunday v. Dave Kohel Agency, Inc.*, 2006 WI 92, ¶21, 293 Wis. 2d 458, 718 N.W.2d 631. We conclude that, under the unambiguous terms of the lease, RBF's obligation to pay the minimum Percentage Rent ended when the Basic Term of the lease ended.

IT IS ORDERED that the order is summarily affirmed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals