STATE OF MICHIGAN

COURT OF APPEALS

SUSAN M. WICKINS a/k/a SUSAN M. MEADOW a/k/a SUSAN M. PENDERGRASS, PATRICIA M. WHITE and MARTHA M. MORTENSON

Plaintiffs/Appellees/Cross-Appellants,

v

LYON MARINE, LTD. and LYMAN R. LYON,

Defendants/Appellants/Cross-Appellees.

UNPUBLISHED
April 1, 1997

No. 176355
Macomb Circuit Court
LC No. 88-001256-CK

Before: Wahls, P.J., and Fitzgerald and L.P. Borrello,* JJ.

PER CURIAM.

In this action involving commercial real estate leases, defendants appeal by right from a judgment in favor of plaintiffs, and plaintiffs cross-appeal from that portion of the judgment which denied them future rents, property taxes and attorney fees. We affirm the judgment and remand for an evidentiary hearing with regard to plaintiffs' attorney fees.

I

Defendants contend that the trial court erred in concluding that defendants were not constructively evicted from the premises. We disagree. This Court has previously defined constructive eviction as a "landlord's act which deprives the tenant of beneficial enjoyment of the premises to which he is entitled under the lease, causing the tenant to abandon the premises." *Briarwood v Faber's Fabrics, Inc*, 163 Mich App 784, 790 n 2; 415 NW2d 310 (1987). To establish a constructive eviction, a tenant must relinquish the premises within a reasonable time after the act or condition arises. 2 Cameron, Michigan Real Property Law (2d ed), §20.55, p 926, citing *Grove v Youell*, 110 Mich 285; 68 NW 132 (1896). A tenant may waive a constructive eviction claim if he continues to occupy the premises, unless he does so at the request of the landlord or in reliance upon the landlord's promises. *Id.* at 926-927.

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* Circuit judge, sitting on the Court of Appeals by assignment.

Defendants contend that they were constructively evicted because of problems involving the sprinkler system and the gas and electric meters. As the trial court concluded, however, plaintiffs corrected each of these problems, and defendants did not introduce any evidence that these problems denied defendants their beneficial use and enjoyment of the premises. Defendants further argue that they were constructively evicted by the clutter on the premises. Defendant Lyman Lyon testified at trial, however, that he did not lose any square footage for storage as a result of the clutter. In addition, Lyon testified that the serious clutter problems began in the early summer of 1986, but defendants did not leave until May of 1988, and thus did not vacate within a reasonable time. The trial court correctly held that defendants had not proven that they were constructively evicted from the premises.

Defendants further contend that the trial court erred in concluding that Lyman Lyon's personal guaranty of the leases were valid. We disagree. Where a principal debt or obligation has been materially altered, any guaranty of that debt or obligation is discharged, unless the guarantor has consented to the alteration. *Wilson Leasing Co v Seaway Pharmacal Corporation*, 53 Mich App 359, 369; 220 NW2d 83 (1974). If the alteration causes the debt or obligation to increase, or extends the time for performance, then it is a material alteration. *Id.* at 369-370.

Defendants contend that the leases were materially altered by the electric meter incident, the sprinkler system incident, the clutter of the premises, the loss of use of storage space, and by permitting children and others to play on the premises. None of these incidents caused the obligations owed under the leases to increase, nor did they extend defendants' time for performance. Defendants have failed to identify any other manner in which these incidents materially altered their obligations under the leases.

II

On cross-appeal, plaintiffs first argue that the trial court erred by failing to award them future rents beyond October 1, 1988, when the premises were leased to a new tenant. We do not agree. The leases provided that plaintiffs were entitled to rents for any period when defendants vacated and the premises were unoccupied, as well as any difference between the rents owed under the leases and rents paid by subsequent tenants during the lease term, if less. The trial court concluded that any difference between the rents paid by defendants and the rents the subsequent tenant paid were minuscule, and plaintiffs do not dispute that determination. Accordingly, the trial court properly declined to award plaintiffs future rents beyond October 1, 1988, the date the premises were re-leased.

Next, plaintiffs argue that the trial court erred by failing to award them property taxes. We do not agree. The party asserting a damages claim has the burden of proving its damages with reasonable certainty. *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 108; 535 NW2d 529 (1995). The trial court concluded that plaintiffs had failed to proffer evidence of the amount of the taxes which were due. Plaintiffs seek to rely, on appeal, upon a letter from their attorney to defendants which summarized the taxes owed. However, that letter was admitted into evidence on the condition that copies of the actual tax bills would be introduced subsequently. When plaintiffs later sought to introduce the bills, the trial court refused to admit them because the testimony showed that they were not accurate. There was

no evidence in the record from which the trial court could ascertain defendants' portion of the property taxes. Accordingly, the trial court did not err in refusing to award property taxes to plaintiffs.

Finally, plaintiffs contend that the trial court erred in refusing to award them attorney fees as provided for in the leases and in denying them an opportunity to introduce evidence of fees. We agree that the trial court should have given plaintiffs an opportunity to prove their attorney fees. The trial court denied plaintiffs attorney fees because it concluded plaintiffs had failed to offer evidence of the amount of attorney fees. Plaintiffs moved to reopen the proofs, which the trial declined. Where a lease provides for attorney fees, this Court has remanded in other cases for an evidentiary hearing regarding the amount and reasonableness of the fees. *Sentry Ins v Lardner Elevator Co*, 153 Mich App 317, 326; 395 NW2d 31 (1986); *Michigan National Leasing Corp v Cardillo*, 103 Mich App 427, 436; 302 NW2d 888 (1981). We conclude that the same remedy is appropriate in this case, and remand.

The judgment in favor of plaintiffs is affirmed, and the case is remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Myron H. Wahls
/s/ E. Thomas Fitzgerald
/s/ Leopold P. Borrello