

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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RUSH EQUIPMENT CENTERS OF MICHIGAN,  
INC.,

UNPUBLISHED  
August 30, 2007

Plaintiff-Counter-Defendant-  
Appellee,

v

SARKIS ATIKIAN and ARLENE ATIKIAN,

Defendants-Counter-Plaintiffs-  
Appellants.

No. 269485  
Macomb Circuit Court  
LC No. 2004-000840-CK

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Before: White, P.J., and Zahra and Fort Hood, JJ.

PER CURIAM.

This action arises out of a commercial lease agreement. Following a bench trial, plaintiff Rush Equipment Centers of Michigan, Inc., was awarded \$11,000 on its claim for return of a security deposit, and defendants Sarkis and Arlene Atikian were awarded partial damages of \$2,300 on their counterclaim to recover the cost of damages allegedly caused by plaintiff upon vacating the real property. Defendants appeal as of right, challenging the trial court's findings of fact and refusal to award additional damages for other claims arising from the lease agreement. We affirm.

I. Basic Facts And Procedure

This case involves property at 7200 Fifteen Mile Road, in Sterling Heights, Michigan. Plaintiff, a full service John Deere dealer, leased the property from defendants.

Plaintiff filed its complaint in district court in July, 2003, to recover an \$11,000 deposit. Defendants responded with an answer and counterclaim in October, 2003, alleging that plaintiff owed them damages of \$150,000, and the case was transferred to circuit. Defendants conceded that plaintiff was entitled to the \$11,000 deposit, and the matter proceeded to a bench trial on defendants' counterclaim for damages. Defendants alleged that there were lease breaches by plaintiff and that plaintiff caused significant damage to the premises. Defendants argued that plaintiff owed \$59,268 for terminating the lease four months early; \$7,700 to remove damaged cement; \$38,500 to replace the damaged cement; \$5,000 for replacement of an oil interceptor; \$12,000 to paint the building inside and out; \$2,500 to clean, repair, and paint the floors; \$2,500

for a damaged electrical meter; \$15,000 for a utility meter hookup; and \$5,000 for replacement of the security gate.

According to defendant Arlene Atikian, plaintiff approached them and asked to lease their building for plaintiff's equipment business. The parties executed a lease with a "commencement date" of August 12, 1999, and a "termination date" of July 31, 2000, "or the end of option period." Arlene recalled that plaintiff contacted defendants to amend the lease, and that the amended "effective date" was May 1, 2002. She acknowledged that the amendment applied only to specific provisions of the lease agreement, and increased the rent by 3.5 percent beginning on August 1, 2003. Arlene believed that plaintiff paid two months' rent and then, in May, 2002, gave notice of its "intention to vacate the property on or about June 15, and to complete it by July 31st." According to Arlene, the "commencement date" and the "effective date" were "one in the same," and plaintiff gave only two months notice, not the six-month notice required under the lease. However, Arlene acknowledged that the definitions of the lease defined "commencement" and "effective" separately.

Arlene described each area of damage and presented estimates for repairs. Arlene identified photographs of the damaged concrete, and testified that the concrete behind the building was "normal" before plaintiff took control of the property, and that it was "pulverized" when plaintiff left. Arlene explained that defendants never backed their trucks over the concrete. Defendants bought the property in 1997, and the existing concrete had not been replaced when plaintiff leased the property in 1999. Arlene testified that a metal front door to the building was damaged when plaintiff bolted a sign onto it, which created holes, interfered with the door's closing, and made it "inoperable." Arlene also testified that plaintiff installed the oil interceptor and that plaintiff removed it. Arlene explained that installation of an oil interceptor was required before plaintiff could get a certificate of occupancy. She described an oil interceptor as a machine that separates oil from water as "an environmental precaution." According to the lease, upon termination, the "lessee may remove all of its equipment and trade fixtures, provided lessee returns the premises to the condition, the same or similar as at the beginning of the term of the lease." However, Arlene testified that plaintiff "knew from the get-go that they were not supposed to take that out once it was put in. It was our agreement to leave it in." Arlene claimed that "according to our lease, that was to remain. That was specifically discussed and it was agreed to. And then, when I turned around it was gone."

According to Arlene, it was part of the agreement that plaintiff would paint the interior and exterior of the building, but plaintiff "did nothing except further damage the building." Arlene testified that plaintiff promised to do the painting but agreed that there was nothing in writing requiring them to do so. Arlene believed that plaintiff power-washed the building, creating oil and dirt contamination. Arlene testified that the walls were "filthy," which she did not consider to be normal wear and tear. She explained that plaintiff damaged the floors of the building, and that there was a security gate to the property when plaintiff took possession, which was gone when plaintiff vacated. Arlene had no personal knowledge of when the gate was removed or who removed it, but was claiming damages for its loss.

In a provision titled "Utility Meter Option," the lease amendment provided that defendants, at their "sole option and expense," could install a separate utility meter and that, following installation, plaintiff agreed "to pay lessor the amount of \$15,000 upon written request." Arlene testified, however, that plaintiff agreed to install a new meter for \$15,000, but

failed to do so. She explained that she asked plaintiff to install the meter. Except for some electrical work, defendants had not yet repaired the damage to the property; they were waiting to receive money from plaintiff.

Alan Hords, a licensed contractor, testified that he “built out the interior space directly” for plaintiff before plaintiff moved into defendants’ building. At that time, Hords recalled, the concrete behind the building showed normal wear and tear. He explained that he added a new sanitary sewer, interior partitions, air conditioning and a furnace, carpet, ceiling tiles, and new electrical work. According to Hords, the building and concrete were not in a damaged condition when plaintiff took occupancy. Hords was in and out of the property a couple of times a month. Hords explained that, as part of plaintiff’s business, 40,000- and 50,000-pound bulldozers were driven into the building and onto the concrete in the back. The bulldozers were power-washed and parked in a line by the back fence. As a result, the inside of the building was greasy and the walls were “beat up,” and when plaintiff vacated the property, the interior showed more than normal wear and tear due to plaintiff’s “heavy use” of the building. Hords testified that the concrete behind the building was “pulverized” from the heavy machinery being driven over it. He did not see anyone except plaintiff driving heavy equipment on that area of the property. Hords also testified that there was a gate to the property when plaintiff took possession, which was gone when plaintiff left. Hords knew that a gate used to be there, but was not there anymore. Hords testified that plaintiff removed the oil receptor and cemented over the area. The trial court did not allow Hords to testify about the estimated costs of repair, although he had prepared an estimate, because Hords based his bid on the estimates of his subcontractors.

Plaintiff’s former division manager, Mark Wisong, testified that defendants’ property was in “very, very poor” condition before plaintiff leased it. The exterior of the building needed paint, the driveway was in “disrepair,” and the concrete was broken up because of a drain that clogged, froze, and backed up. Wisong explained that plaintiff did not pulverize the cement behind the building, and that it was already damaged when plaintiff took occupancy. Wisong testified that plaintiff repaired the building at its own expense, upgraded the electrical system, replaced doors, and added bathrooms. Wisong testified that, after plaintiff took possession, it learned that defendants had also leased part of the parking lot to truck drivers so that they could park their trucks at night. The truck drivers used the front gate to the property at all hours, and often left the gate open. Wisong recalled that there was no functional gate on the back of the property when plaintiff took possession, and that someone removed the gate altogether after plaintiff took occupancy. Wisong testified that plaintiff “wanted it back,” and that he asked defendant Sarkis Atikian<sup>1</sup> to replace the gate because plaintiff suffered losses as a result of the unsecured property. Because there was no gate, plaintiff had to padlock the fuel and engine areas of its equipment and hire a security guard. As soon as plaintiff found another available property, it terminated the lease and moved its dealership. According to Wisong, plaintiff left defendants’ property with \$150,000 in improvements. Wisong recalled that, after plaintiff vacated, he walked the premises with Arlene’s husband, Sarkis, to inspect it. Plaintiff repaired everything that Sarkis asked it to repair, and “he said everything was fine.” Sarkis did not object

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<sup>1</sup> Sarkis, Arlene’s husband, did not testify.

to removal of the oil interceptor, which Wisong considered a trade fixture, did not ask that more painting be done, did not ask plaintiff to replace any doors, and did not ask plaintiff to leave the interceptor or replace the fence or gate. An environmental concern arose after plaintiff vacated, and plaintiff hired a crew to resolve the problem by removing some dirt.

Patrick J. McGee, a licensed master plumber and plumbing contractor, testified by deposition that he would charge \$5,340 to install an oil interceptor in defendants' building.

Gregory Zawrotny, owner of Keystone Fence, testified by deposition that he would charge \$4,600 to install a double-slide gate and one panel of fencing; his original estimate did not take into account the fact that the poles would also need to be replaced, which would add \$800 to his estimate. Zawrotny agreed that it appeared from the photo exhibits that the old gate was a double-swing gate rather than a double-slide gate.

Lawrence Bowman, a painter, testified by deposition that the exterior of the building needed sealing and caulking, but that it was probably normal wear and tear because block walls tend to crack when they get older. The inside ceilings were "really dirty" and needed a "major clean job" and the walls needed "a lot of prepping," "more than normal prep." The estimate for power washing, caulking, and painting was \$54,500.

Charles Valuet, a door and materials salesman, testified by deposition that he could replace the pedestrian or "man door" for \$1,800, and repair the bent rolling overhead door for \$500. Valuet testified that the door had four holes in it where a sign had been hung, and that the frame was corroded by rust and broken.

Curt Bottcher, of DeBuck Construction, testified by deposition that his estimate to repair the concrete was \$50,050. Bottcher prepared the estimate with square footage provided to him over the phone by Hords, whose testimony had been rejected by the trial court, without inspecting or measuring the property; he measured the parking area on the afternoon of the deposition. Bottcher did not perform core samplings. Defendants had not accepted Bottcher's estimate at the time of trial.

In a December, 2005, order and opinion the trial court awarded plaintiff \$11,000 for the return of its security deposit. With respect to defendants' counterclaim, the court found that defendants were entitled to recover \$2,300 for the damage to the front metal door, but rejected each of defendants' remaining claims for damages. Accordingly, plaintiff was awarded net damages of \$8,700.

## II Analysis

Defendants argue on appeal that the court's opinion does not contain facts sufficient to support its conclusions; and, more specifically, that the court's conclusion with regard to the damaged concrete was not sufficiently supported by the facts elucidated at trial. Further, defendants claim that the court erred by concluding that the oil interceptor was a trade fixture. We disagree.

### 1. General Sufficiency Of Factual Findings

In a bench trial, the trial court's findings of fact are reviewed for clear error. *Gumma v D & T Constr Co*, 235 Mich App 210, 221; 597 NW2d 207 (1999). MCR 2.517(A)(2) allows: "Brief, definite, and pertinent findings and conclusions on the contested matters are sufficient, without overelaboration of detail or particularization of facts."

In this case, the trial court's opinion refers to the applicable sections of the lease agreement, separately discusses each individual claim, and identifies the evidence on which the court relied to resolve each claim. In rejecting defendants' claim for reimbursement of the cost of damaged concrete, the court referred to evidence demonstrating that the cement was damaged before plaintiff occupied the premises, that defendants permitted other trucks to use the parking area, and that several years had elapsed since plaintiff vacated the property. Additionally, the court found no credible evidence that plaintiff removed a security gate. The court determined that defendants were not entitled to recover the cost of replacing an oil interceptor because it was a trade fixture, which plaintiff was expressly permitted to remove upon vacating the property. The court also determined that defendants were not entitled to recover painting costs because these expenses were attributable to ordinary wear and tear; and that defendants were not entitled to recover the cost for installation of a new electrical meter because it found that a meter was never installed. Given this elaboration, we conclude that the trial court's findings of fact and conclusions of law were sufficient under MCR 2.517(A). See also *Kemerko Clawson, LLC v RxIV Inc*, 269 Mich App 347, 355; 711 NW2d 801 (2005).

## 2. Sufficiency Of Evidence Related To Damaged Concrete

Defendants next argue that the trial court clearly erred in finding that they were not entitled damages for the cost of repairing damaged concrete. Defendants suggest that the trial court ignored evidence that supported defendants' position. Defendant Arlene Atikian testified that the concrete was "normal" before plaintiff occupied the property. A licensed contractor also testified that the concrete showed normal wear and tear before plaintiff occupied the property. Conversely, plaintiff's manager testified that the concrete was broken up before plaintiff took occupancy, because a drain had clogged, froze, and backed up. Moreover, even if the concrete was not damaged when plaintiff first occupied the property, there was evidence that defendants had also leased the parking lot to other truck drivers so that they could park their trucks at night. Given the testimony that the condition of the property when the lease began and the cause of any subsequent damage to the concrete were questions of fact, we will not disturb findings by the trier of fact absent clear error, which error has not been shown on appeal. Therefore, we conclude that the trial court's determination that plaintiffs were not responsible for the damage to the concrete is supported by the evidence and not clearly erroneous.

## 3. The Oil Interceptor Was A Trade Fixture

Under the terms of the lease, plaintiff was required to "install an oil interceptor on the Premises for [plaintiff's] use previous to washing any equipment." The lease further provided:

. . . Upon termination of the Lease, Lessee may remove all of its equipment and trade fixtures provided Lessee returns the Premises to a condition the same or similar as it was at the beginning of the term of the Lease. No other improvements maybe [sic] removed.

Defendants argue that the oil interceptor was not a trade fixture, because a trade fixture must be removable without material injury to the premises. Courts must interpret the terms of a contract in accordance with their commonly used meanings. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 354; 596 NW2d 190 (1999). Because “trade fixture” is not defined in the lease, the trial court properly looked to the common and ordinary definition of this term. As the trial court observed, a trade fixture is defined in Black’s Law Dictionary (revised 4th ed) as “an article placed in or attached to rented premises in furtherance of the tenant’s trade or business and which is generally removable.”

It is undisputed that the oil interceptor was placed on the property by plaintiff to advance its business purposes. Contrary to what defendants assert, a trade fixture does not necessarily have to be removable without injury to the premises. Indeed, Black’s Law Dictionary (8th ed) describes a trade fixture as:

removable personal property that a tenant attaches to leased land for business purposes, such as a display counter. Despite its name, a trade fixture is not usually treated as a fixture – that is, as irremovable.

Further, the parties’ lease agreement contemplated that removal of a trade fixture might cause some damage to the property, because it required that the lessee, upon removing a trade fixture, return the property to the condition it was in at the beginning of the lease. There was evidence that defendant Sarkis Atikian inspected the property when plaintiff vacated, and did not object to the removal of the oil interceptor or to the repair of the floor. The evidence supports the trial court’s determination that the oil interceptor qualified as a trade fixture, and that plaintiff was entitled to remove it when vacating the property.

Affirmed.

/s/ Helene N. White  
/s/ Brian K. Zahra  
/s/ Karen M. Fort Hood