2012 IL App (1st) 120030-U

THIRD DIVISION
November 30, 2012

No. 1-12-0030

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

MICHAEL JACOBS, Plaintiff-Appellee, v. DONNA P. McKINNEY, TRUSTEE, DONNA P. McKINNEY DECLARATION OF TRUST DATED AUGUST 15, 1990 AS AMENDED JUNE 20, 2002, Defendant-Appellant, and 1242 NORTH LAKE SHORE DRIVE CORPORATION, JOHN POCHOLICK, JAMES MARTELL, DR. PETER McKINNEY, WILLIAM TOBEY, WILLIAM GARDNER, MICHAEL SMITH, MICHAEL MURPHY, JOHN GIBBONS, JOHN BRENNEN and HELEN MELCHIOR, Defendants.	)	Appeal from the Circuit Court of Cook County No. 09 CH 15811 Honorable LeRoy K. Martin, Jr., Judge Presiding.

JUSTICE STERBA delivered the judgment of the court.
Justices Steele and Salone concurred in the judgment.

ORDER

¶ 1 *Held*: No genuine issue of material fact exists that Plaintiff's lease incorporates space that has been partitioned off with a wall to preclude access to former stairwells. An adverse possession claim may only be brought against the property's titleholder, and Plaintiff was not that party. The statute of limitations for a breach of contract claim begins to accrue when a party knows or should know of the breach, which here was when the building's board did not grant its approval of Plaintiff's renovation plans. Plaintiff did not waive his claim to the former stairwell spaces because he actively pursued his rights to those spaces once he was denied use of the spaces.

¶ 2 Defendant-appellant the McKinney Trust appeals the circuit court's granting of summary judgment in favor of Dr. Michael Jacobs and denying its cross-motion for summary judgment regarding the use of spaces in stairwells that previously connected two separate floors in a cooperative apartment building. The McKinney Trust claims that its lease includes the disputed spaces because the words “air conditioning machinery” were handwritten in the sentence discussing equipment in the apartment, but Jacobs claims that its lease includes the disputed space because handwritten in the sentence addressing the leased area were the words "space equivalent to 11 room typical." The McKinney Trust also claims that the circuit court erred in rejecting its affirmative defenses of adverse possession, expiration of the statute of limitations and waiver. The McKinney Trust asserts that an adverse possession claim may be brought against a party other than the property's title owner, that the statute of limitations began when Jacobs' apartment was first rented in 1968 and that Jacobs waived any claim to the spaces because he signed an "as-is" rider and reviewed a floor plan that had the spaces closed-off before purchasing shares in the cooperative. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 The parties stipulated to the following background facts. 1242 North Lake Shore Drive (1242 LSD) is a cooperative apartment building ("co-op") that was constructed in 1929 and it owns the entire building. 1242 LSD leased the building's apartments to the original leaseholders in 1968 through execution of a proprietary lease and issued shares of stock in the co-op to those leaseholders. When a leaseholder sells shares of the co-op, the original proprietary lease is assigned from the prior leaseholder to the new leaseholder. 1242 LSD must consent to a lease's assignment.

¶ 5 Jacobs is the current leaseholder of Apartment 22. The McKinney Trust is the current leaseholder of Apartment 21, and Dr. Peter and Mrs. McKinney reside in that apartment. Peter McKinney was a member of the Board of Directors for 1242 LSD (the Board), serving as the Board's past president, vice president and on the Architectural & Construction Committee. He served on the Board until November 10, 2008.

¶ 6 Prior to 1967-68, Apartment 21 and Apartment 22 formed a single duplex apartment with a staircase located on the north and south sides of the apartment connecting the 21st and 22nd floors. 1242 LSD assumed the lease of the duplex apartment and in 1967-68, it separated the duplex apartment into two apartments, now known as Apartment 21 and Apartment 22. During the separation process, 1242 LSD removed the entire staircase on the north side and most of the staircase on the south side of the now separated apartments. It also installed heating and air conditioning units in the stairwell spaces located on the 21st floor, which serviced the air in Apartment 21. At the entrance to the stairwells in Apartment 22, 1242 LSD erected an interior

wall precluding entrance into the stairwells, which were now either partially or entirely removed, but both stairwell spaces were still accessible through Apartment 21. After 1242 LSD completed the separation of the apartments, it entered into a proprietary lease for each apartment. There have been no modifications to the leases' language since they were first executed. Apartment 21 was first leased to Scott and Barbara Hodes on January 1, 1968, then assigned to Barbara Hodes individually on June 1, 1977, next to Dr. Peter and Mrs. McKinney on April 27, 1979 and finally to the McKinney Trust on May 7, 2003. Apartment 21's lease states in relevant part:

> "In consideration of the premises and the covenants and conditions hereinafter set forth, the Lessor has leased and by these presents does hereby lease unto the Lessee, and the Lessee hires and takes as Lessee all that certain space herein sometimes collectively referred to as the 'Apartment' comprising *Nine* rooms on the *21st* floor in the *Center* tier of the building commonly known and described as 1242 Lake Shore Drive."

Subsection C of the lease entitled "additional rent" provides in pertinent part:

> "(a) The Lessee will, at his own expense, keep the interior of the Apartment, its equipment (including air conditioning machinery, refrigerators, stoves and electrical fixtures) and appurtenances, in good order, condition and repair, in a clean and sanitary condition and do all decorating, painting and varnishing which may at any time be necessary to maintain the good appearance and condition of said Apartment, and suffer no waste thereof or injury thereto."

The words "air conditioning machinery" were handwritten in the top margin of page 4 of the lease. The north stairwell space on this floor is a mechanical room that stores the air

conditioning and heating unit for Apartment 21 and is located only on the 21st floor. The south stairwell space on the 21st floor stores another air conditioning unit, as well as a punching bag and McKinney's other personal affects. The air conditioning and heating units have been in the stairwell spaces continuously since 1242 LSD separated the duplex apartment.

¶ 7 Apartment 22 was first leased to Henry Freund on August 1, 1968, then assigned to Maurice and Eve Heffer on April 1, 1975, next to Eve Heffer individually on August 5, 1980 and finally to Jacobs on June 29, 2007. Apartment 22's lease states in relevant part:

> "In consideration of the premises and the covenants and conditions hereinafter set forth, the Lessor has leased and by these presents does hereby lease unto the Lessee, and the Lessee hires and takes as Lessee all that certain space herein sometimes collectively referred to as the 'Apartment' comprising -*8*- rooms on the *22st* floor
>
> (SPACE EQUIVALENT TO 11 ROOM TYPICAL)
>
> floor in the _____ ~~tier of the~~ building commonly known and described as 1242 Lake Shore Drive."

The phrase "SPACE EQUIVALENT TO 11 ROOM TYPICAL" was handwritten in the bottom margin of page 1 of the lease and that language was included in the lease when it was assigned to Jacobs on June 29, 2007. Before the lease was assigned to Jacobs, he separately executed an "as-is" rider stating that his offer was for the property in its present and "as-is" condition. He also viewed a floor plan that included an "x" through the former north stairwell space and a double line at the former south stairwell space.

¶ 8 After moving into Apartment 22, Jacobs wished to renovate the apartment. His plans

included expanding the floor space of his apartment to include the former stairwell spaces, which he had no access to at that time. Jacobs hired an architect to assist with the renovation plans and submitted the plans to the Board for approval. After reviewing the proposed plans, the Board denied Jacobs' renovation request on September 8, 2008.

¶ 9 On April 13, 2009, Jacobs filed a complaint, he filed an amended complaint on November 10, 2009, a third amended complaint on December 10, 2009 and a fourth amended complaint on April 7, 2010. The fourth amended complaint, which included 1242 LSD[1] and Peter McKinney as defendants, raised the following counts: (1) breach of contract - specific performance against 1242 LSD; (2) a violation of city code against 1242 LSD; (3) a declaratory judgment and injunctive relief against 1242 LSD and the McKinney Trust; and (4) a breach of fiduciary duty against Peter and the other co-op Board members. 1242 LSD, the McKinney Trust and the other listed defendants filed their answer and affirmative defenses on May 5, 2010. On August 25, 2010, 1242 LSD filed a motion for voluntary dismissal of the violation of city code count from the fourth amended complaint, which the circuit court granted on September 7, 2010.

¶ 10 Jacobs filed a motion for summary judgment on August 12, 2011 relating to the declaratory judgment count asserting that there is no genuine issue of material fact that the disputed spaces were leased to Apartment 22. On September 9, 2011, the McKinney Trust filed a cross-motion for summary judgment asserting that Apartment 21's lease incorporated and leased both the north and south stairwell spaces. During the litigation process, Jacobs was

[1] Because 1242 LSD and Jacobs reached a settlement, the claims that Jacobs raised against 1242 LSD are not addressed in this appeal.

deposed, and questions during the deposition were asked to determine when he learned of the space behind the partitioned walls and when he decided to renovate the space. Oral argument on the motions for summary judgment was held on November 29, 2011. On December 14, 2011, the circuit court granted Jacobs' and denied the McKinney Trust's motion for summary judgment. The McKinney Trust timely filed this appeal.

¶ 11 ANALYSIS

¶ 12 The McKinney Trust claims on appeal that the circuit court erred in granting summary judgment in Jacobs' favor because the handwritten phrase "Space Equivalent to 11 Room Typical" does not mean that the entire potential floor space on the 22nd floor was leased to Apartment 22. The McKinney Trust also asserts that the language of Apartment 21's lease must be interpreted before interpreting the language of Apartment 22's lease, and when done so, interpretation of Apartment 22's lease is not necessary because Apartment 21's lease clearly conveys the stairwell spaces to Apartment 21.

¶ 13 Summary judgment should be granted when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2008); *People ex rel. Department of Public Health v. Wiley*, 218 Ill. 2d 207, 220 (2006). We review a circuit court's ruling on a motion for summary judgment *de novo. Id*.

¶ 14 In this appeal, we must interpret the leases' language to determine whether Jacobs has the right to use and occupy the former stairwell spaces that are now enclosed by a wall or if that right belongs to the McKinney Trust. In doing so, we will apply the commonly recognized rules of

contract construction because the rules adopted to interpret a contract are the same rules that govern the interpretation of a lease. *Claredon America Ins. Co. v. Prime Group Realty Services, Inc.*, 389 Ill. App. 3d 724, 729 (2009). When interpreting a contract's language, the primary goal is to uphold the parties' intent by interpreting the contact as a whole and applying the plain and ordinary meaning to unambiguous terms. *Village of Arlington Heights v. Anderson*, 2011 IL App (1st) 110748, ¶ 22. A lease that contains definite and precise language requires no interpretation because the instrument speaks for itself. *Claredon America Ins. Co.*, 389 Ill. App. 3d at 729*; NutraSweet Co. v. American National Bank & Trust Co. of Chicago,* 262 Ill. App. 3d 688, 694 (1994). Language in a lease that is susceptible to more than one meaning, however, is considered ambiguous, but the parties' disagreement on the language's meaning does not render the language ambiguous. *Claredon America Ins. Co.*, 389 Ill. App. 3d at 729. Interpreting the language of a lease is a question of law, which we determine independent of the circuit court's judgment. *NutraSweet Co.*, 262 Ill. App. 3d at 694.

¶ 15 In the case *sub judice*, the parties, in essence, disagree on who has the right to use and occupy the air space between Apartment 21's floor and Apartment 23's floor in the stairwell spaces where staircases were previously located. Reviewing Apartment 21's lease, we note that the original lease executed on January 1, 1968 defined "Apartment" as "comprising nine rooms on the 21st floor in the center tier of the building commonly known and described as 1242 Lake Shore Drive." The language used in this lease is not ambiguous because the space leased is clearly identified based on the ordinary and plain meaning of those words, and those words are not susceptible to more than one meaning. Apartment 22's lease originally executed on August 1,

1968 defined "Apartment" as "comprising 8 rooms on the 22nd (space equivalent to 11 room Typical) floor in the _____ ~~tier of the~~ building commonly known and described as 1242 Lake Shore Drive." The phrase "space equivalent to 11 room typical" was handwritten in the lease underneath the phrase "comprising 8 rooms on the 22nd." Noteworthy is use of the word "space." Apartment 22's lease identified the leased area as consisting of 8 rooms, but further explained that the leased area equaled the *space* equivalent to 11 rooms typical. Thus, the original parties executing Apartment 22's lease in 1968 were concerned with the amount of space leased and not the number of rooms and intended to lease the space equivalent to 11 rooms typical. The parties stipulated to a floor plan that reflected a 11 room *simplex* apartment at 1242 LSD when the building was first built. The space comprising the former stairwells must be included in the space leased to Apartment 22 to attain the space equivalent to a typical apartment in the co-op with 11 rooms. Currently, the former north and south stairwell spaces extend unobstructed from Apartment 21's floor to Apartment 23's floor, and the space in those apartments extends the entire length of the floor from wall-to-wall. Apartment 22's space, however, does not extend the entire length of the floor because a wall was constructed to preclude entrance to the former stairwell spaces from the 22nd floor. Based on the language in Apartment 22's lease and the intent of the original parties to the lease that the apartment's leased space would equal the space in an 11 room typical apartment, construction beyond the erected walls and into the former stairwell spaces is permitted.

¶ 16 The McKinney Trust argues that it is only necessary to interpret Apartment 21's lease to resolve the dispute surrounding the contested spaces because in section (1)(c)(a) of that lease,

"air conditioning machinery" was handwritten into the following provision:

> "The Lessee will, at his own expense, keep the interior of the Apartment, its equipment (including air conditioning machinery, refrigerators, stoves and electrical fixtures) and appurtenances, in good order, condition and repair, in a clean and sanitary condition and do all decorating, painting and varnishing which may at any time be necessary to maintain the good appearance and condition of said Apartment, and suffer no waste thereof or injury thereto."

The McKinney Trust claims that because the air conditioning machinery is enclosed in a separate area that previously comprised the stairwell spaces and the lease states that the lessee is responsible for keeping the apartment's equipment in good working order, the spaces enclosing the air conditioning machinery are included in Apartment 21's lease. We do not disagree that the floor space that was designated as mechanical rooms on Apartment 21's floor plan does, in fact, comprise the area leased to Apartment 21. However, we disagree that the space leased in Apartment 21's lease includes not only the floor space of the mechanical rooms on the 21st floor, but also the air space in the former stairwells extending from the 21st floor to the 23rd floor. Apartment 21's lease does not expressly incorporate a provision providing for the lease of the stairwell spaces or the air space adjacent to the walls erected by 1242 LSD in Apartment 22 to preclude access to the stairwell spaces where the stairs have been either fully or partially removed. Moreover, inclusion of the words "air conditioning machinery" in the additional rent section of Apartment 21's lease does not support a conclusion that the space in the mechanical rooms where that machinery is located belongs to Apartment 21 to the exclusion of Apartment

22. When read in context, Apartment 21's lease requires the lessee to keep the apartment's equipment, which includes "air conditioning machinery," in good order, condition and repair. Inclusion of the handwritten words "air conditioning machinery" in Apartment 21's lease, however, does not support the conclusion that the McKinney Trust ask this court to reach that the entire former stairwell spaces where the air conditioning equipment are located belongs to Apartment 21 exclusively. Instead, reading that provision applying the ordinary meaning of the words used provides that the lessee of Apartment 21 must maintain and repair the "air conditioning machinery."

¶ 17 We are also not persuaded that the strike out of the words "tier in the" in Apartment 22's lease has significance in resolving the dispute over the stairwell spaces. Apartment 21's lease identified the location of the apartment in the "center" tier of the building. The term "tier" means "one of a series of rows or ranks rising one behind or above another, as of seats in an amphitheater, boxes in a theater, guns in a man-of-war, or oars in an ancient galley." Random House Webster's Unabridged Dictionary 1982 (2nd ed. 1998). Thus, identification of the apartment's tier relates to its vertical location in the building and not the horizontal space that it occupies on a floor. A similar designation of where Apartment 22 is located in the building is absent from its lease, but given the height of the building, its vertical location in the building is easily determined and the lack of the tier information does not render the lease ambiguous.

¶ 18 The McKinney Trust further claims that because a window currently exists in the former south stairwell space that provides sunlight into Apartment 21 when that apartment's door is open, it would be deprived of property that it has enjoyed for the past 30 years if that space is

determined to belong to Apartment 22. Although Apartment 21's current enjoyment of the mechanical room warrants consideration, it does not override the language of the leases, which supports the conclusion that Apartment 22's lease provided for the lease of the full floor, including the spaces allocated to the former stairwells. Apartment 22's lease expressly allocated to it the space equivalent to 11 rooms typical in the building. To achieve that space requirement, there is no genuine issue of material fact that the former stairwell spaces adjacent to walls of Apartment 22 is included in the total space leased to Apartment 22. Our conclusion that no genuine issue of material fact exists that Apartment 22's lease includes the lease of a full floor consistent with the surrounding full floor apartments does not diminish the floor space that Apartment 21 is currently leasing, but merely extends the floor space leased to Apartment 22 to make it equal to the floor space provided for in the lease and leased by the apartments above and below Apartment 22.

¶ 19 The McKinney Trust also claims that the circuit court erred in rejecting all three of its affirmative defenses consisting of adverse possession, expiration of the statute of limitations and waiver. We will first address its adverse possession defense. To establish adverse possession, a party must establish 20 years of concurrent existence of the following five elements: "(1) continuous; (2) hostile or adverse; (3) actual; (4) open, notorious, and exclusive possession of the premises; and (5) under claim of title inconsistent with that of the true owner." *Joiner v. Janssen*, 85 Ill. 2d 74, 81 (1981). The adverse possessor bears the burden of proof to establish each of the five elements by clear and unequivocal evidence. *Id.* The fundamental principle underlying the doctrine of adverse possession is that the possessor holds land adversely to the

true titleholder. *Id.* at 80. The adverse possessor claims ownership to property "in derogation of the right of the real owner." *Id.* He acknowledges that he does not have legal title and that title is in another. *Id.* Ill will is not necessary to establish the "hostile" element, but, instead, only the assertion of ownership that is incompatible with the true owner and all others. *Id.* at 81.

¶ 20 The McKinney Trust maintains that an adverse possession claim may be brought against a party other than the title holder, and more specifically against a lessee. Relying on *8930 South Harlem, Ltd. v. Moore*, 77 Ill. 2d 212 (1979), it claims that Illinois law recognizes a proprietary interest in leaseholds. The McKinney Trust is correct that Illinois law recognizes that leaseholds have an interest in real estate, but *8930 South Harlem, Ltd.* stated that a lease "conveys a lesser interest than does a deed executed to consummate a sale." *Id.* at 220. The *8930 South Harlem, Ltd.* court went on to state that the "leasehold interest conveyed consisted of the right of the use and possession of the premises for the full term of the lease." *Id.* Thus, Illinois law is clear that a lessee has an interest in real estate, but that interest relates to the use and possession of the property and not actual ownership. The law in Illinois is equally clear that the essence of adverse possession is the possession of land adversely to the true *titleholder*. *Joiner*, 85 Ill. 2d at 80. A party claiming ownership by adverse possession rests his claim upon a holding adverse to the true owner of the property. *Id.* Moreover, all presumptions relating to adverse possession are in favor of the title owner. *Davidson v. Perry*, 386 Ill. App. 3d 821, 825 (2008). These general propositions of the law relating to adverse possession establish that a claim for such possession must be brought against the true owner of the property.

¶ 21 In the case *sub judice*, Jacobs and the McKinney Trust stipulated that 1242 LSD, as a co-

op, "owns the entire building and property, including the apartments and the spaces that comprise the apartments, and leases the apartments to leaseholders." The parties also stipulated that "1242 LSD enters into proprietary leases with each of the original leaseholders for each respective apartment and issues shares of stock to the Co-Op to each leaseholder." Thus, the record establishes that 1242 LSD and not Jacobs is the title owner of the apartment that the McKinney Trust is asserting its claim of adverse possession against. As previously stated, adverse possession claims may be asserted against title owners. Because Jacobs is not a title owner of Apartment 22, the McKinney Trust's adverse possession defense is not available against Jacobs. Similarly, it is unknown what the McKinney Trust's hostile or adverse possession act was, as well as its open, notorious and exclusive possession of the disputed property, which, here, was in essence the air space adjacent to Apartment 22. The McKinney Trust asserts that the "hostile" nature of its possession was established because a wall was erected to seal off access to each of the stairwell spaces by Apartment 22 in 1968. We agree with the McKinney Trust that under the proper factual scenario, such an action may amount to "hostile," but 1242 LSD, and not the McKinney Trust, was the party that erected the walls. As such, the addition of the walls was not a hostile act by the McKinney Trust sufficient to establish its adverse possession.

¶ 22 Because the McKinney Trust possessed the mechanical rooms, which were spaces leased to it and clearly delineated on the floor plan, its possession of those spaces was not hostile or adverse. Although a window is partially located in the disputed area of the former stairwell, 1242 LSD and not the McKinney Trust added the window to the exterior of the building. The McKinney Trust also does not have exclusive possession of the premises because, as a co-op,

1242 LSD has the right to enter into the mechanical rooms located in Apartment 21. As the party seeking to assert adverse possession, the McKinney Trust had the burden of proving each of the five elements by clear and unequivocal evidence. *Davidson*, 386 Ill. App. 3d at 825. Based on the evidence in the record, it failed to meet that burden.

¶ 23 The McKinney Trust next asserts the statute of limitations as a defense claiming that any relief that Jacobs would be entitled to results from the breach of a contract, which has a 10 year statute of limitations. It claims that applying the 10 year limitation period, any cause of action relating to the lease expired on August 1, 1978, based on the initial execution of Apartment 22's lease on August 1, 1968.

¶ 24 The statute of limitations for claims based on a written lease is 10 years after the cause of action accrued. 735 ILCS 5/13-206. A cause of action relating to contract actions accrues at the time of the breach of contract and not when a party sustains damages. *Hermitage Corp. v. Contractors Adjustment Co.*, 166 Ill. 2d 72, 77 (1995). Under the discovery rule, " 'when a party knows or reasonably should know both that an injury has occurred and that it was wrongfully caused, the statute begins to run and the party is under an obligation to inquire further to determine whether an actionable wrong was committed.' " *Id.* at 86, quoting *Nolan v. Johns-Manville Asbestos*, 85 Ill. 2d 161, 170-71 (1981).

¶ 25 1242 LSD first leased Apartment 22 on August 1, 1968, and the lease was assigned to Jacobs on April 18, 2007. After the assignment, Jacobs began gathering information regarding the apartment's remodeling, which included expansion of Apartment 22's current floor space. In order to do so, approval by 1242 LSD was required, but it denied that approval, which Jacobs

perceived as being contradictory to the lease's language. Thus, Jacobs knew or should have known that he was denied access to space that he believed belonged to him on the day that 1242 LSD denied his request for renovation approval, which was on September 18, 2008. Accordingly, the statute of limitations commenced on that day and Jacobs filed his cause of action on April 13, 2009, which was within 10 years. Thus, Jacobs' claim was not time barred. Moreover, there is no indication in the record that a prior leaseholder submitted plans to the Board for approval regarding the expansion of Apartment 22's floor space, or that any such plans were denied. Because the record is devoid of evidence indicating the Board's prior rejection of renovation plans involving the expansion of floor space, Jacobs could not have known that Apartment 22 was precluded from accessing space provided to it under the lease prior to the rejection of his own request.

¶ 26 The McKinney Trust's last affirmative defense of waiver was based on Jacobs' failure to raise any claim about the apartment's space before the assignment of the lease to him despite having viewed the premises multiple times prior to closing, and the assignment of the lease provided that he accept the premises "as is." The McKinney Trust also claims that Jacobs received a floor plan prior to executing the assignment that depicted an “x” through the north stairwell and a double line through the south stairwell spaces signifying that those areas were not part of the leased area. Because of these prior opportunities to inquire of the actual space that was leased, the McKinney Trust maintains that any claim that Jacobs is now raising is waived.

¶ 27 Generally, the phrase "as-is" is understood to mean " "that the buyer is purchasing goods in their present condition with whatever faults they may possess." " *Kopley Group V., L.P. v.*

Sheridan Edgewater Properties, Ltd., 376 Ill. App. 3d 1006, 1016 (2007), quoting *Pelc v. Simmons*, 249 Ill. App. 3d 852, 856 (1993). A real estate contract that includes an "as is" provision means that "the purchaser agrees to take the property in its existing condition with whatever faults it may possess and implies that the seller is relieved of any further obligation to reimburse for loss or damage because of the property's condition." *Id.*

¶ 28 Here, Jacobs' claim does not relate to the property's condition, but the space associated with the apartment. The "as-is" provision states in pertinent part: "THIS OFFER IS MADE FOR THE REAL PROPERTY IN ITS PRESENT AND 'AS-IS' CONDITION AND HAS BEEN INSPECTED BY THE PURCHASER." Jacobs is not bringing a cause of action relating to the condition of the apartment's facade, wall distress, damage to floors or appliances, but for the accurate amount of space leased. See *Id.* at 1016-17 (finding that an "as-is" provision in a real estate contract precluded a breach of contract claim where the deteriorating condition of a building's facade that had prior work done to it was known to the purchaser prior to purchase). If we were to adopt the McKinney Trust's position that a real estate contract assigning shares in a co-op with an "as-is" provision relates not only to the condition of the premises, but also to the amount of space associated with the apartment, then a party would not be permitted to bring claims that are discoverable only through remodeling projects and not known at the time of purchase based on an "as-is" provision. Here, the "as-is" provision is not applicable to the claim that Jacobs is raising because his claims are not based on the *condition* of the premises.

¶ 29 The McKinney Trust also maintains that Jacobs waived any claim to the space because he reviewed a floor plan prior to the assignment of the lease that had an "x" or a double line in the

stairwell spaces. In Illinois, the commonly accepted definition of "waiver" is the "intentional relinquishment of a known right." *Ryder v. Bank of Hickory Hills*, 146 Ill. 2d 98, 104 (1991). A party may waive a right either by an express agreement or it may be implied from that party's conduct. *Id.* at 105. The party asserting waiver bears the burden of proving that a party waived its rights. *Id.* A party impliedly waives a right when he acts in such a way that demonstrates his intention to waive a right or his actions are inconsistent with any intention other than to waive it. *Id.*

¶ 30 To determine whether waiver applies, we must consider Jacobs' actions and whether the McKinney Trust met its burden of demonstrating that Jacobs waived his rights to the stairwell spaces. During his deposition, Jacobs stated that when he was considering purchasing shares in the co-op, it was his understanding, and he was led to believe, that the stairs were still in the stairwell spaces. Jacobs also stated that during the Admissions Committee Interview, Peter McKinney asked him if he had any plans to renovate the stairwell spaces on his floor. Jacobs responded that he wanted to live in the apartment for some time and decide later what his full renovation plan would be after he got a feel for the building. Jacobs also believed that the stairs, which he thought were still intact in the stairwells, were beautiful, old wood stairs. Although he did not ask anyone if he could remove the wall to access either of the stairwell spaces, Jacobs believed that Peter's question during the Admissions Committee Interview asking what his intention was regarding renovation of the spaces implied that he could, in fact, renovate the spaces. The floor plan had an "x" through the prior north stairwell, but Jacobs did not ask anyone what the "x" meant and it did not come up in conversations. Jacobs saw and asked about the

double line in the half circle space on the floor plan, and the prior tenant informed him that it was a partition that 1242 LSD erected to block access to the stairs and stairwell. Jacobs knew that there was a decorative window in the south stairwell space because he saw it when he walked the perimeter of the building. In November 2007, Jacobs decided to have an architect draw plans to open the empty stairwell spaces on his floor and construct a new floor with steel beams as anchors in those areas.

¶ 31 In addition to Jacobs' intention regarding renovation of the apartment when he purchased the shares, we must also consider his actions after he moved into the apartment. Jacobs purchased the lease's shares on April 18, 2007 and starting in November 2007, he actively pursued renovation of the apartment, which included expanding the floor space into the stairwells that were partitioned off from the rest of the apartment. It was not until after he moved into the apartment and started to plan for the renovation did he learn that the stairs were no longer fully intact in the stairwells and the area consisted of open space. When his request for the expanded floor space was denied by 1242 LSD, Jacobs thereafter pursued legal action. Based on these facts, Jacobs' waiver of his rights to the stairwell spaces cannot be established. The McKinney Trust relies on the "as-is" clause and the floor plan provided to Jacobs prior to his purchase of the shares, but neither of these items establishes that Jacobs knowingly and intentionally relinquished his right to the stairwell spaces. Thus, waiver, too, is not a viable affirmative defense.

¶ 32 CONCLUSION

¶ 33 For the reasons stated, we affirm the circuit court's grant of summary judgment in Jacobs' favor and denial of the McKinney Trust's motion for summary judgment.

¶ 34 Affirmed.