

Breach of lease  
Tortious interference

Zeeb v. Knight 96-6031-fra  
(In re In-Shape International, Inc. 695-64461-fra11)

8/26/97 FRA Unpublished

Zeeb leased commercial space to In-Shape and Steve Knight, its president. Knight informed Zeeb that In-Shape would not be renewing its lease pursuant to its option because it was moving to another facility which it was having constructed. The initial term of the lease was to end on November 30, 1993, but Knight indicated that it could not move in to its new facility prior to December 1 and asked for some flexibility. Zeeb found a new tenant for his facility prior to the expiration of In-Shape's lease which required 17,200 square feet, considerably more than the 10,600 leased by In-Shape. On December 1, Zeeb and a representative of the new tenant demanded that Knight and In-Shape vacate immediately. Knight met with Zeeb on December 9 and informed Zeeb that In-Shape could not immediately move, but agreed to vacate 3,000 square feet to meet the tenant's immediate needs. In-Shape would continue to occupy the remaining premises on a month-to-month basis. Knight thereafter tendered and Zeeb accepted rent checks for December, January, February, and March, 1994. In March, the prospective tenant gave up and found a new facility. In-Shape moved out in April. At no time did Zeeb write to In-Shape to terminate the month-to-month tenancy. In-Shape thereafter filed for bankruptcy and Zeeb brought this action for damages for breach of the lease and tortious interference with the prospective lease.

The court held that Zeeb, by accepting the lease payments, effectively exercised the landlord's option under the lease, creating a month-to-month tenancy on which In-Shape was entitled to rely unless and until it was terminated in the manner required by the lease. Zeeb's testimony that he had no choice given Knight's statement that he would not move until his new facility was ready carried no weight given Oregon's statutory scheme for eviction. There was therefore no breach of the lease. As for the claim of tortious interference, there was insufficient evidence to find that the Defendant acted either for an improper purpose or by improper means, a requirement for that cause of action under Oregon law. Judgment for Defendant.

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UNITED STATES BANKRUPTCY COURT  
DISTRICT OF OREGON

IN RE)  
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IN-SHAPE INTERNATIONAL, INC.,) Case No. 695-64461-fra11  
)  
Debtor. \_\_\_\_\_)  
)  
JEFFREY A. ZEEB, )Adv. Proc. No. 96-6031-fra  
Plaintiff, )  
)  
vs.)  
)  
STEVE L. KNIGHT,)  
)MEMORANDUM OPINION  
Defendant. \_\_\_\_\_)

In this case Plaintiff seeks damages from a former tenant for breach of the lease and tortious interference by the tenant with a prospective tenancy to succeed that of the tenant. I find for the Defendant on both claims.

I. JURISDICTIONAL AND PROCEDURAL ISSUES

Plaintiff is the successor in interest to Aaron Zeeb, and owner of commercial property in Marion County, Oregon. This property was leased to Defendants Knight and In-Shape

1 International, Inc. In-Shape is the debtor in the bankruptcy  
2 case to which this adversary proceeding is related; Knight is its  
3 president. For clarity's sake, the parties will be referred to  
4 as "Zeeb" and "Knight".

5 Zeeb filed a complaint in the Circuit Court for Marion  
6 County, naming Knight and In-Shape as defendants. In-Shape  
7 removed the case to this Court when its bankruptcy case was  
8 commenced. Zeeb dismissed In-shape as a defendant, and then  
9 moved to remand the case to the Circuit Court. Knight and In-  
10 Shape resisted, asserting that Knight was entitled to be  
11 indemnified by In-Shape for any liability imposed in this case.  
12 Since the existence of the duty to indemnify meant that the  
13 outcome of this case could have affected In-Shape's ability to  
14 reorganize, the court found that the case was one "related" to  
15 the bankruptcy, and subject to this court's jurisdiction.  
16 28 U.S.C. § 1334(b).

17 The parties thereafter consented to trial and entry of  
18 judgment by a bankruptcy judge. 28 U.S.C. §157(c)(2).

## 19 II. FACTS

20 Zeeb is the owner of a light industrial facility in the city  
21 of Salem, Oregon. In October, 1989 Knight and In-Shape agreed to  
22 lease a portion of the premises. A written commercial lease was  
23 executed by Zeeb, and both Knight and In-Shape.<sup>1</sup> The term of the  
24 lease was to continue through November 30, 1993. The tenants had

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26 <sup>1</sup>Knight signed both as President of In-Shape and individually. It is clear that he was a party to the lease itself, and not simply a guarantor.

1 a right to renew the lease for an additional two years. The  
2 option could be exercised by written notice to Zeeb given not  
3 later than October 31, 1993. On July 27, 1993 Knight wrote to  
4 Zeeb:

5 In-Shape will not be renewing the lease on  
6 your commercial building located at 1732  
7 Salem Industrial Drive NE.

8 In-Shape will be building new facilities  
9 and we are currently formalizing the time  
10 frame for construction and moving. I am told  
11 we will have a move in date of 12/01/93. If  
12 possible, a little flexibility around that  
13 time would be very helpful.

14 The lease contained a provision addressing the issue of  
15 tenant holdover after the expiration of the lease:

16 C. Holdover:

17 If Tenant does not vacate the leased premises at  
18 the time required, Landlord shall have the option to  
19 treat Tenant as a tenant from month to month, subject  
20 to all of the provisions of this lease except the  
21 provision for term and renewal and at a rental rate  
22 equal to 150 percent of the rent last paid by Tenant  
23 during the original term. Failure of Tenant to remove  
24 fixtures, furniture, furnishings, or trade fixtures  
25 which Tenant is required to remove under this lease  
26 shall constitute a failure to vacate to which this  
paragraph shall apply if the property not removed will  
substantially interfere with occupancy of the premises  
by another tenant or with occupancy by Landlord for any  
purpose including preparation for a new tenant.

2. If a month-to-month tenancy results from  
holdover by Tenant under this paragraph, the tenancy  
shall be terminable at the end of any monthly rental  
period on written notice from Landlord given not less  
than ten (10) days prior to the termination date which  
would otherwise be provided by law with respect to a  
month-to-month tenancy.

Zeeb was able to find a new tenant before the  
Knight/In-Shape lease was to expire. On October 6 he wrote to

1 Knight:

2 As per our conversation on October 5, 1993, it  
3 looks at this time that Viacom will lease the  
4 building....

5 In visiting with Terry Dillard, manager of Viacom,  
6 he indicated that he would be open to renting the  
7 building to you on a month to month basis for a short  
8 period of time in order to give you time to move into  
9 your new building. The rent would be \$ 0.27 1/2 per  
10 sq. ft. starting as of December 1, 1993.

11 By November 7 the terms of a lease had been hammered out by  
12 Zeeb and Viacom. The draft lease was for 17,200 square feet of  
13 space, considerably more than the 10,600 feet leased to Knight  
14 and In-Shape. The draft lease contained a provision anticipating  
15 the possibility of a holdover:

16 Possession: Tenant's right to possession and  
17 obligations under the lease shall commence on 12-1-93,  
18 or such other date as the premises are available for  
19 possession by Tenant if possession is not given on the  
20 opening day of the term, provided however, that Tenant  
21 may terminate this lease by giving Landlord written  
22 notice of termination if possession is not given to  
23 tenant prior to \_\_\_\_\_.

24 The blank space was never filled in; in fact, the lease was  
25 never actually signed, although it had been approved by Viacom's  
26 management. Aaron Zeeb testified that, although the lease was  
ready to sign by December 1, he was unwilling to commit himself  
to the lease because Knight and In-shape had not vacated the  
premises.

Knight's hopes to be able to move by December 1 proved to be  
optimistic. By December Knight knew that the new facilities  
would not be ready until April. It appears that this news was  
not given to Zeeb or Viacom before December 1. Zeeb and Dillard

1 appeared at the site that day, and demanded that Knight and In-  
2 Shape vacate immediately. Knight was out of town: his office  
3 staff reached him by phone, and he spoke briefly with Zeeb. The  
4 two agreed that the parties would meet to discuss the matter.

5 The meeting took place on or about December 9. While there  
6 is conflicting testimony about the atmospheric, the parties  
7 agree on this much: Knight asserted that the company could not  
8 afford to move out until their new facilities were available, and  
9 that they intended to stay until then.<sup>2</sup> Viacom's manager  
10 indicated that it was up to Zeeb to resolve the matter.

11 The parties agreed that Knight and In-Shape would vacate  
12 about 3,000 square feet in order to accommodate Viacom's  
13 immediate needs. They could continue to occupy the balance of  
14 the premises on a month-to-month basis. It was clear by then  
15 that Knight intended to remain longer than Zeeb wanted him there.

16 By Knight had already tendered rent for December (a check  
17 was issued on December 3). The amount was corrected to reflect  
18 the vacation of the 3,000 feet, and a new check was cut on  
19 December 17. Thereafter, Knight and In-Shape tendered, and Zeeb  
20 accepted, rent checks for January, February, and March 1994.

21 By March Viacom had given up, and acquired another site.  
22 Knight and In-Shape moved out of the premises in April. At no  
23 time did Zeeb write to Knight to terminate the month-to-month  
24 tenancy. Zeeb's attorney did write on January 3, asserting that

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26 <sup>2</sup>Knight testified that he claimed at the time to have a month-to-month tenancy.

1 the Viacom lease had been lost, and that further occupancy by  
2 Knight would be as a tenant at will, and solely for the purpose  
3 of mitigating Zeeb's damages.

### 4 III. DISCUSSION

5 By accepting rent for the holdover period, Zeeb effectively  
6 exercised the landlord's option under the holdover provision in  
7 the lease. This created a month-to-month tenancy on which Knight  
8 and In-Shape were entitled to rely until terminated in the manner  
9 required by the lease. The subsequent assertion that the tenancy  
10 was something less was of no effect. Zeeb argued at trial that  
11 what was created after the end of the lease term was a tenancy at  
12 will. This would not have been in Zeeb's interest, since it  
13 would have provided for continued possession of the premises  
14 without any of the protections of the landlord's interests  
15 contained in the lease, such as insurance, use of the property,  
16 and the like. What is more likely is that Zeeb intended to  
17 benefit from the terms of the lease as long as Knight and In-  
18 Shape were to remain in possession.

19 Aaron Zeeb testified that he had no alternative, given  
20 Knight's refusal to move, to extension of some form of tenancy.  
21 However, he did have an option: he could have filed an action to  
22 evict Knight. By early December it was made clear to him that  
23 Viacom did not intend to lease the space and then sublet a  
24 portion to Knight, as had been hinted at earlier. While Knight  
25 may have honestly believed that he'd been promised some  
26 flexibility, Zeeb was not obligated to exercise the option to

1 create a month-to-month tenancy, and had not waived his right to  
2 terminate it after December.

3 Oregon law provides for prompt resolution of disputes over  
4 possession of real property. ORS 105.105 et seq. Defendants in  
5 actions by landlords for restitution of the premises must appear  
6 before the court within 7 to 14 days, ORS 105.135(2); a trial  
7 must be scheduled to take place within 15 days of the first  
8 appearance ORS 105.137(5). Given the availability of this  
9 remedy, Zeeb cannot be said to have been coerced into extending  
10 Knight's tenancy. See Oregon Bank v. Nautilus Crane & Equip.  
11 Corp., 683 P.2d 95, 68 Or. App. 131 (1984).

12 Knight threatened to keep matters tied up in litigation for  
13 at least enough time to accomplish his purpose, which was to  
14 avoid having to move twice. Zeeb apparently believed that he  
15 could do so. There is no evidence to suggest how he could have  
16 done so, in light of Oregon's statutory scheme for eviction.  
17 However, whether Knight was bluffing is immaterial: he was  
18 entitled to rely on the holdover terms of the lease as soon as  
19 Zeeb accepted rent for the holdover period. Cf. O.R.S.  
20 105.120(3)(d) (landlord cannot maintain action to recover premises  
21 during holdover period if landlord has accepted rent for period  
22 and has not refunded within four days of receipt).

23 Zeeb's options at the end of November were to extend the  
24 lease on a month-to-month basis, or move to expel Knight and In-  
25 Shape. Accepting rent is consistent with the first option, and  
26 inconsistent with the second. Knight's and In-Shape's occupation

1 of the property after December 1 was consistent with the holdover  
2 provision of the lease, and did not constitute breach thereof.

3 Zeeb's second claim is that Knight tortiously interfered  
4 with the prospective lease with Viacom. Under Oregon law a  
5 plaintiff claiming intentional interference with economic  
6 relations must prove that:

7 1. The defendant intentionally interfered with the  
8 proposed relationship;

9 2. The interference was made with an improper motive or  
10 by using improper means; and

11 3. That, as a result, plaintiff was damaged beyond just  
12 the fact of the interference itself.

13 Ron Tonkin Gran Turismo Inc. v. Wakehouse Motors, Inc., 611 P.2d  
14 658, 663, 46 Or. App. 199, 209 (1980).

15 In this case the evidence is insufficient to find that  
16 Defendant acted either for an improper purpose or by improper  
17 means. It is clear that the parties had contemplated some sort  
18 of holdover as evidenced by the terms of the lease, the letters  
19 regarding a short leaseback from Viacom, and the possession  
20 clause in the Viacom draft lease. It is as likely as not that  
21 Knight's actions, at least in December, were motivated by a  
22 desire to protect his right to holdover month-to-month under the  
23 lease. Thereafter, Zeeb failed to take steps to terminate that  
24 right. Since Knight and In-Shape occupied the premises under the  
25 terms of a still executory lease, Knight cannot be said to have  
26 employed improper means. The fact that Zeeb may have been

1 dissuaded from taking legal action to evict Knight does not, by  
2 itself, mean that Knight employed tortious means.<sup>3</sup>

3 IV. CONCLUSION

4 Zeeb accepted rent from Knight and In-Shape after the  
5 termination date of the lease, without prior agreement that the  
6 terms of the holdover would be any different than those for which  
7 the lease already provided. Thereafter, no action was taken to  
8 terminate the lease. It follows that the occupancy was not  
9 unlawful.

10 Knight is entitled to judgment dismissing both claims, and  
11 awarding judgment against Plaintiff for his costs and reasonable  
12 attorneys fees.

13 The foregoing constitutes the Court's findings of fact and  
14 conclusions of law, which will not be separately stated. Counsel  
15 for Defendant shall submit a form of judgement consistent with  
16 this Memorandum.

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19 Frank R. Alley, III  
20 Bankruptcy Judge  
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26 <sup>3</sup>Of course, had Knight held on to the property while maintaining a meritless defense to  
an eviction proceeding, the issue might have been decided differently.