

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

KMART CORPORATION,	)	FILED: MAY 13, 2009
	)	09CV2913
Plaintiff,	)	JUDGE HIBBLER
	)	No. MAGISTRATE JUDGE SCHENKIER
v.	)	Judge CH
MENARD, INC.,	)	
	)	
Defendant.	)	

**COMPLAINT**

Plaintiff, Kmart Corporation (“Kmart”), for its complaint against defendant Menard, Inc. (“Menards”), states as follows:

**NATURE OF THE ACTION**

1. This action arises from Menards’ breach of its contractual obligations to maintain a retail store and adjacent property in Hanover Park, Illinois (the “Premises”) under a sublease from Kmart. The sublease obligated Menards to keep the Premises in good order, repair and condition. Menards breached that obligation, allowing the Premises to fall into serious disrepair, causing substantial damages to Kmart. Kmart has demanded that Menards compensate it for these damages, but Menards has failed to pay for any of these repairs.

**THE PARTIES**

2. Plaintiff Kmart Corporation is a corporation organized under the laws of the State of Michigan with its principal place of business in Hoffman Estates, Illinois.

3. Defendant Menard, Inc. is a corporation organized under the laws of the State of Wisconsin with its principal place of business in Eau Claire, Wisconsin.

## JURISDICTION AND VENUE

4. This Court has personal jurisdiction over Menards because it is a corporation doing business within the State of Illinois and it has made or performed a contract substantially connected with Illinois.

5. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332(a) because Plaintiff is a citizen of Illinois and Michigan, Defendant is a citizen of Wisconsin, and the amount in controversy exceeds \$75,000 exclusive of interest or costs.

6. Venue is proper in this district pursuant to 28 U.S.C. § 1391(a) in that a substantial part of the events giving rise to Plaintiff's claims occurred in this district.

## FACTS

### Menards' Obligations Under Sublease

7. In 1991, Kmart subleased property including a retail store at 900 West Irving Park Road in Hanover Park, Illinois to Menards. The Premises include the store itself, a parking lot, and adjacent property. The original sublease term ran from 1991 to 1996. The parties extended the term through three written amendments to the sublease, until and including January 31, 2009. A copy of the Sublease and Amendments to the Sublease are attached as Exhibit A.

8. Section 10 of the Sublease places sole responsibility on Menards for "repairs, maintenance and replacements necessary to maintain the Premises in good order, repair and condition." In pertinent part, Section 10 states as follows:

From and after the Term Commencement Date, Sublessee covenants and agrees to make and perform, at its expense, all repairs, maintenance and replacements necessary to maintain the Premises in good order, repair and condition, whether foreseen or unforeseen, exterior and interior, or structural or non-structural ... Sublessor shall not be required to repair, rebuild or maintain the Premises and Sublessee hereby waives any right to make repairs at the expense of Sublessor which it may possess pursuant to any law at any time in effect or under equity.

9. Section 23 of the Sublease reiterates Menards' duty to maintain the Premises, stating as follows:

Upon the expiration or termination of the Sublease Term, Sublessee shall surrender the Premises to Sublessor in good order, repair and condition, except as repaired, rebuilt, restored or altered as permitted or required in this Sublease and except for ordinary wear and tear.

**Menards' Failure to Maintain Premises**

10. Menards breached the Sublease by failing to properly maintain the Premises and failing to surrender the Premises in "good order, repair and condition." Through preliminary inspections of the Premises following the expiration of the Sublease, Kmart discovered the conditions summarized in paragraphs 11 through 22 below.

11. Menards allowed the parking lot on the Premises to deteriorate. The pavement is uneven, cracked and riddled with holes. Accordingly, the parking lot must be replaced. The damage to the parking lot has caused extensive damage to the underlying sewer and drainage system, which now must also be replaced. The cost of replacement of the parking lot and drainage system exceeds \$1 million dollars.

12. The roof of the building must be replaced. The roof has deteriorated and leaks. The leaks have caused further damage, as water dripping from the roof has damaged ceiling tiles, walls and floor tiles.

13. Menards failed to repair exposed wiring and missing outlet covers at several locations in the former retail store on the Premises.

14. The exterior of the building also requires extensive maintenance. Menards failed to repair missing or damaged fencing and guardrails around the Premises and on the roof. There is peeling paint on several exterior walls of the building.

15. Hundreds of ceiling tiles inside the former Menards store are damaged, stained or missing. Due to Menards' failure to repair or replace these tiles, Kmart needs to replace the majority of the ceiling tiles in the Premises.

16. Approximately 20,000 square feet of floor tiles are damaged, warped, stained, or missing. Several areas of the floor have been exposed to open air or water dripping from roof leaks. Consequently, concrete and floor tiles throughout the Premises require replacement.

17. Menards failed to maintain the sprinkler system and exit lighting system in the building. Proper maintenance of both systems is critically important to the safety of people using the facility.

18. The restrooms and plumbing systems in the building require extensive repairs. For example, Kmart discovered a number of sinks pulling away from walls, and several other deficiencies in the existing plumbing system. Kmart has also found that copper piping has been removed from several areas of the building.

19. The HVAC system has a number of broken compressors, missing gauges and hot water coils plugged with dirt. Moreover, Kmart observed three to five inches of standing water in the HVAC system from an unknown source. In sum, the HVAC system requires either extensive repairs or replacement.

20. Menards failed to fix cracks and holes in interior and exterior walls of the retail store on the Premises. Menards left wide cracks in the exterior walls of the building. The cracks compromise the building's integrity and allow pests to enter from outside. Menards also failed to fix holes in several interior walls of the building. Rather than repairing the walls, Menards covered a few of the holes in interior walls with corrugated metal.

21. Menards failed to repair interior and exterior doors to the Premises. Kmart discovered several metal doors that were severely damaged, but left unrepaired by Menards. Menards altered other doors by replacing commercial-grade hardware and door handles on the doors with materials suitable only for residential purposes. Residential hardware is not appropriate for a commercial setting – and thus Kmart will be forced to replace the hardware installed by Menards. In addition, many overhead doors require repair or replacement.

22. The above-listed conditions are only a subset of the extensive damage caused by Menards' failure to maintain the Premises.

23. Through a series of written notices, Kmart has repeatedly demanded that Menards pay for the damages caused by its failure to maintain the Premises.

24. In order to allow Menards to perform its own evaluation of the Premises, Kmart allowed Menards representatives to inspect the Premises after Kmart served its initial written demands. That inspection took place weeks ago.

25. Menards has not offered to pay for any of the damages caused by its failure to maintain the Premises.

26. Under the terms of the Sublease, including but not limited to Section 19(b), Menards agreed to pay, "on demand," all expenses incurred by Kmart as a result of a breach of the Sublease by Menards, including attorneys' fees and court costs.

27. Accordingly, Menards is liable for any and all costs, expenses and attorney fees incurred by Kmart relating to Menards' failure to maintain the Premises.

## BREACH OF CONTRACT

28. Paragraphs 1 through 27 above are realleged and incorporated by reference.

29. The Sublease between Kmart and Menards is a valid and enforceable contract.

30. Kmart has performed its obligations under the Sublease and all conditions precedent have been met.

31. Under the Sublease, Menards is liable for damages caused by its failure to maintain the Premises, or to surrender the Premises to Kmart in good order, repair and condition. Ex. A, ¶ 10, 23.

32. Menards failed to maintain the Premises or surrender in good condition.

33. Kmart has been damaged as a result of Menards' breach of the Sublease.

34. Under Paragraph 19(b) of the Sublease, Menards must pay Kmart "on demand," all expenses incurred by Kmart as a result of a breach of the Sublease by Menards, including attorneys' fees and court costs.

WHEREFORE, Kmart Corporation asks that the Court award damages in an amount sufficient to compensate Kmart Corporation for Menards' breaches of the Sublease, award Kmart Corporation attorneys' fees, prejudgment interest, costs and expenses of suit, and grant such other and further relief as this Court may deem just and proper.

Dated: May 13, 2009

Respectfully submitted,

By: /s/William B. Berndt  
One of the Attorneys for Plaintiff  
Kmart Corporation

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