

STATE OF MICHIGAN
COURT OF APPEALS

COMERICA BANK,

Plaintiff-Appellee,

v

BICKERSON'S, INC.,

Defendant-Appellant.

UNPUBLISHED
October 29, 1996

No. 184917
LC No. 94-070653-CK

Before: Fitzgerald, P.J., and O'Connell and T.L. Ludington,* JJ.

PER CURIAM.

Defendant appeals as of right the trial court order granting summary disposition to plaintiff pursuant to MCR 2.116(C)(10). We reverse and remand.

Defendant first argues that the trial court erred in granting plaintiff's motion for summary disposition because genuine issues of material fact existed. We agree. Plaintiff acknowledged in its motion for summary disposition that defendant contended that its rental obligations should be abated due to the landlord's nonfulfillment of terms of the lease and that defendant disputed which lease governed its rental obligation. Although plaintiff argued below that affidavits attached to its motion showed that defendant's claim that the landlord had not fulfilled its obligations under the lease were untrue, defendant submitted an affidavit supporting the claim. The court may not make findings of fact or weigh credibility in deciding a summary disposition motion. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Furthermore, plaintiff's argument that MCL 554.233; MSA 23.1137(3) precluded any modification of defendant's lease without plaintiff's permission relies on a factual assumption that the February 1, 1994, lease was a modification of the old lease rather than a new, independent lease. Consequently, summary disposition was inappropriate. Before summary disposition may be granted, the court must be satisfied that it is impossible for the claim or defense asserted to be supported by evidence at trial. *SSC Associates v General Retirement System*, 192 Mich App 360, 365; 480 NW2d 275 (1991).

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

We also note that upon remand the trial court should resolve an apparent discrepancy between the different leases that each party argues controls defendant's rental obligation. The January 10, 1990, lease designates the rental premises as 1212 Greenwood Avenue, Jackson, Michigan and indicates that it is intended to be used as an office. The February 1, 1994, lease designates the rental premises as 1214 Greenwood Avenue, Jackson, Michigan, and indicates that it is intended to be used as a restaurant and bar.

Defendant next argues that the trial court erroneously interpreted MCL 554.233; MSA 26.1137(3) as prohibiting new leases where the former lease has expired. Although the trial court never explicitly made such a ruling, it appears that the judgment was based in part on this implicit finding. While the statute precludes modification of existing leases without the assignee's consent, it does not indicate that once a lease has expired any subsequent lease between the same parties must contain the same terms. Because the statute plainly applies to modifications, it would be inappropriate to judicially construe it to also require approval of new leases where the former lease has expired. *Ravenna Education Assoc v Ravenna Public Schools*, 70 Mich App 196, 203; 245 NW2d 562 (1976); *Livingston Co Bd of Social Services v Dep't of Social Services*, 208 Mich App 402, 406; 529 N.W.2d 308 (1995).

Finally, defendant argues that the trial court erred in denying its request for an evidentiary hearing. As already noted, because there existed genuine issues of material facts, further factfinding is necessary to resolve plaintiff's claim.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald

/s/ Thomas L. Ludington