

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

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CITY OF DETROIT,

Plaintiff-Appellee,

v

DETROIT COMMERCE ASSOCIATES,

Defendant-Appellant.

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UNPUBLISHED

December 30, 1996

No. 188056

Wayne County

LC No. 95-502871-CK

Before: Taylor, P.J., and Markman and P. J. Clulo,\* JJ.

PER CURIAM.

Defendant appeals by right the trial court's order granting plaintiff's motion for summary disposition and denying defendant's motion for summary disposition. We affirm.

This matter arises out of plaintiff's complaint for declaratory judgment. Plaintiff sought a declaration that it was entitled to exercise an early termination provision in a commercial property lease. The parties entered into a five-year lease on February 1, 1984. They executed amendments to this lease on February 15, 1985, February 1, 1989 and April 6, 1993. The second amendment contained the following provision:

1. (a) The term of the Lease shall be extended for a five (5) year period so that the same expires January 31, 1994.

(b) Upon twelve (12) months advance written notice to Landlord, which notice may be given at any time after February 1, 1992, tenant shall have the right to terminate the Lease.

The third amendment contained the following provision:

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

3. The term of the Lease shall be extended for a five (5) year period so that the same expires January 31, 1999.

The three amendments contained clauses ratifying the previous versions of the lease subject to the changes made in each amendment. Specifically, the third amendment stated:

The Lease, as herein amended, is hereby ratified and confirmed by the parties and shall remain in full force and effect.

Documentary evidence demonstrated relevant circumstances regarding the early termination provision. The early termination provision was added to the lease in the second amendment because plaintiff feared that future funding cuts might affect its ability to continue the lease through the entire five year term. Shortly before the parties drafted the third amendment, plaintiff's representative presented defendant's representative with a list of modifications for the floors occupied by plaintiff's Planning and Development Department. Defendant's representative stated that he indicated to plaintiff that defendant would not undertake these modifications without a five-year extension of the lease. Plaintiff agreed to the extension. Plaintiff also rewired the floors that were to be renovated at its own expense. Based on the agreement to a five-year renewal and this rewiring, defendant's representative contended that he believed that plaintiff agreed to forego the early termination provision. However, plaintiff's representative stated that she never indicated this to any of defendant's representatives. Defendant's representative admitted that he assumed, without asking, that plaintiff would forego the early termination provision. Further, defendant's representative, who drafted the third amendment, admitted that he "inadvertently neglected" to draft an explicit deletion of the early termination provision.

Defendant's first claim on appeal is that the trial court improperly granted plaintiff's motion for summary disposition. Defendant argues that the circumstances surrounding the drafting of the third amendment created ambiguity as to whether it retained the early termination provision. This Court reviews decisions on motions for summary disposition de novo to determine if the moving party was entitled to judgment as a matter of law. *Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994).

MCR 2.116(C)(10) permits summary disposition when, except for the amount of damages, there is no genuine issue concerning any material fact and the moving party is entitled to [judgment] as a matter of law. A court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the opposing party and grant the benefit of any reasonable doubt to the opposing party. [*Id.*]

In *Michaels v Amway Corp*, 206 Mich App 644, 649; 522 NW2d 703 (1994), this Court stated:

When deciding a motion for summary disposition in a contract claim, a court may interpret the contract only where the terms are clear. If the terms are ambiguous, a

factual development is necessary to determine the intent of the parties, and summary disposition is inappropriate.

In *Michigan Chandelier Co v Morse*, 297 Mich 41, 49; 297 NW 64 (1941), the Court stated:

We must look for the intent of the parties in the words used in the instrument. This court does not have the right to make a different contract for the parties or to look to extrinsic testimony to determine their intent when the words used by them are clear and unambiguous and have a definite meaning.

Here, the trial court granted plaintiff's motion for summary disposition. It held:

The early termination provision adopted by the parties was left unaltered by the final and extant lease. Such contractual terms are not subject to judicial construction absent ambiguity, nor is it the function of the court to remake or alter an agreement.

The terms of the lease are clear and unambiguous. The third amendment ratified the previous version of the lease subject to any changes made therein and was silent regarding the early termination provision. In contrast, we note that paragraph 5 of the third amendment specifically omitted section 48 of the lease -- mitigation of damages. The second amendment provided for a five year term yet added the early termination provision. Thus, the third amendment's provision of a five year term is not inconsistent with retention of the early termination provision. The plain language of the ratification clause in the third amendment indicates that the early termination provision, which was not addressed in the third amendment, was ratified thereby.<sup>1</sup> While we recognize that a harsh result ensues from plaintiff's exercise of the early termination provision and are sympathetic about plaintiff's travails with the City's bureaucracy, this result flows from the third amendment, which defendant drafted. The trial court appropriately found that the lease was unambiguous and interpreted the third amendment to have retained the early termination provision.

Defendant makes several claims based on its contention that there is an ambiguity in the contract that requires resort to extrinsic evidence regarding the parties' intent. Because the contract is unambiguous, these arguments fail. Specifically, defendant failed to provide documentary evidence to indicate that there was a mutual mistake or scrivener error regarding inclusion of the early termination provision, see *Dingeman v Reffitt*, 152 Mich App 350, 358; 393 NW2d 632 (1986), or that plaintiff knew that defendant mistakenly retained this provision and concealed this knowledge, see *Barryton State Savings Bank v Durkee*, 325 Mich 138, 141-142; 37 NW2d 892 (1949).

Defendant also argues that the trial court erred in granting plaintiff's motion for summary disposition because a genuine issue of material fact existed regarding whether plaintiff was estopped from exercising the early termination provision. "Equitable estoppel arises where a party, by representations, admissions or silence, intentionally or negligently induces another party to believe facts, the other party justifiably relies on and acts on this belief, and will be prejudiced if the first party is permitted to deny the existence of those facts." *Hoye v Westfield Ins Co*, 194 Mich App 696, 705; 487 NW2d 838 (1992). Here, the trial court appropriately found that defendant could not have

justifiably relied on its presumption that plaintiff would remain for the entire term of the lease where the contract expressly provided for an early termination.

Defendant next claims that the trial court erred in granting plaintiff's motion for summary disposition because defendant presented a genuine issue of material fact regarding whether plaintiff acted in bad faith in exercising the early termination provision. In *Eastway & Blevins Agency v Citizens Ins Co of America*, 206 Mich App 299, 302-303; 520 NW2d 640 (1994), this Court stated:

In contract termination cases, good faith is required only where the terminating party has unbridled discretion with respect to the other party's performance under the contract. A lack of good faith cannot override an express provision in a contract. . . . Where, as here, a party's discretion to terminate is limited, good faith need only have existed at the time the original agreement was made. [Citations omitted.]

Here, the early termination provision did not give plaintiff "unbridled discretion" regarding defendant's performance. It was an express provision that allowed plaintiff to terminate the lease on twelve months' notice. In any event, defendant failed to show that plaintiff acted in bad faith either at the time the parties drafted the early termination provision or when it exercised this right.

Defendant also contends that the trial court's granting of plaintiff's motion for summary disposition was premature because discovery was not complete. Because the lease at issue was unambiguous, discovery could not have uncovered evidence that would vary its terms. Accordingly, the trial court did not err in granting plaintiff's summary disposition motion before discovery was complete here. See *Hasselbach v TG Canton, Inc*, 209 Mich App 475, 481-482; 531 NW2d 715 (1995).

Defendant next claims that the trial court erroneously denied its motion for summary disposition. Defendant first argues that plaintiff lacked standing to bring a declaratory action because it had breached the lease, and therefore was precluded from bringing an action to enforce it. Specifically, defendant claims that plaintiff failed to pay rent, to vacate certain floors and to meet with defendant to resolve the conflict regarding exercise of the early termination provision. "The rule in Michigan is that one who first breaches a contract cannot maintain an action against the other contracting party for his subsequent breach or failure to perform." *Michaels, supra* at 650 citing *Flamm v Scherer*, 40 Mich App 1, 8-9; 198 NW2d 702 (1972). The trial court aptly noted that the present action is not a suit against defendant for any breach or failure to perform the lease. Rather, it is a declaratory action requiring contract interpretation: whether the third amendment to the lease retained the early termination provision.

Defendant also argues the existence of genuine issues of material fact precluded plaintiff from seeking a declaratory judgment. "Ordinarily the court will refuse a declaration which can be made only after a judicial investigation of disputed facts." *United States Fidelity & Guaranty Co v Kenosha Investment Co*, 369 Mich 481, 485; 120 NW2d 190 (1963) citing *Washington-Detroit Theatre Co v Moore*, 249 Mich 673, 678; 229 NW 618 (1930). Here, the declaratory relief sought by plaintiff turns on interpretation of an unambiguous lease provision. Accordingly, plaintiff's declaratory action did

not require a judicial investigation of disputed facts. In its opinion, the trial court correctly advised that defendant may bring a breach of contract action against plaintiff if plaintiff has breached the lease and that any such claim would not preclude a declaration that the third amendment retained the early termination provision.

For these reasons, we affirm the trial court's grant of plaintiff's motion for summary disposition and denial of defendant's motion for summary disposition.

Affirmed.

/s/ Clifford W. Taylor

/s/ Stephen J. Markman

/s/ Paul J. Clulo

<sup>1</sup> We also note that “[i]t is an elementary rule of construction that, in case of doubt, the instrument is to be strictly construed against the party by whose agent it was drafted.” *Michigan Chandelier*, at 46. Here, defendant's representative drafted the third amendment.