

STATE OF MICHIGAN
COURT OF APPEALS

THIRD HORIZON GROUP, LP,

Plaintiff/Counterdefendant-
Appellee/Cross-Appellant,

v

MOLITOR & MOLITOR, INC., d/b/a DI'S
HALLMARK,

Defendant/Counterplaintiff-
Appellant/Cross-Appellee.

UNPUBLISHED

August 24, 2001

No. 224058

Muskegon Circuit Court

LC No. 99-039185-CK

Before: Collins, P.J., and Hoekstra and Gage, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's order entering judgment in favor of plaintiff following a bench trial. Plaintiff cross-appeals the trial court's denial of sanctions against defendant. We reverse in part and remand.

Defendant entered into a lease with plaintiff for space to operate Di's Hallmark in one of plaintiff's shopping malls. When defendant first took possession of its mall space in October 1995, two major tenants, Witmark and Elder Beerman, were open in the mall. In June 1997, however, Witmark went out of business. Subsequently, defendant reduced the amount of rent it paid to plaintiff. Defendant believed that the addendum to the lease allowed for an abatement of rent if one of the major tenants went out of business and was not replaced within 120 days. Plaintiff brought this suit, claiming that defendant had breached the terms of the parties' contract because plaintiff believed that under the contract, defendant was entitled to rent abatement only if neither major tenant was open for business.

The specific contract provision in question is found in the lease addendum and is titled "Major Tenant Co-Tenancy." That section provides as follows:

MAJOR TENANT CO-TENANCY: The "Major Tenant Co-Tenancy" is the requirement that either of the Major Tenants, Witmark or Elder Beerman, are open for business at the Shopping Center on a continuous basis. If, at any time during the Lease Term, the Major Tenant Co-Tenancy is not fully satisfied and remains unsatisfied for one hundred twenty (120) days, then, until such closed

Major Tenant is replaced with a Major Tenant operating as a department store, discount department store or another store generally recognized as an anchor type which is open and operating in the Shopping Center on a continuous basis, Minimum Rent shall abate and Tenant shall only be obligated to pay Substitute Rent equal to the lesser of (i) four percent (4%) of Tenant's monthly Gross Sales or (ii) monthly Minimum Rent otherwise due at that time. Substitute Rent shall be paid, together with Additional Rents, within twenty-five (25) days after the end of the month in which the sales were generated. Any Substitute Rent paid during the abatement of Minimum Rent shall be classified as "Minimum Rent" for purposes of computing the sum of Percentage Rent due in any given calendar year. If the Major Tenant Co-Tenancy remains unsatisfied for more than three hundred sixty five (365) days or if at any time during the Lease Term any two (2) Major Tenants are not open for business at the Shopping Center on a continuous basis, then Tenant may, at anytime thereafter, provided Tenant can demonstrate a comparable sales decline in excess of twenty (20%) per cent during the same previous year's rent period, terminate the Lease by giving Landlord thirty (30) days prior written notice, and the parties shall be relieved of any further obligations under the Lease.

After a one-day bench trial, the trial court found that the lease agreement was a standard lease form, but the addendum, which contained the major tenant cotenancy provision (hereinafter, "co-tenancy provision"), was "the product of extensive negotiations between the parties." The court also found that

the "either-or" language in the first sentence supports plaintiff's contention that the defendant has been required to pay full rent because one anchor store, Elder Beerman, has continued to be open. However, the plural verb "are" in the first sentence, as well as the language of the second sentence, support defendant's contention that because one of the two anchor stores closed, he is entitled to a partial abatement of rent.

The court concluded, on the basis of the language of the first two sentences of the co-tenancy provision, that the provision was ambiguous. The court further determined that the intent of the parties, as testified to at trial, could not resolve the ambiguity, because testimony showed that the parties had different intentions regarding the co-tenancy provision. The court ultimately entered judgment for plaintiff because it found that the evidence was uncontroverted that defendant's agent had drafted the addendum, and it applied the general principle that an ambiguous contract provision is construed against the drafting party. The trial court declined to impose sanctions against defendant because it did not find the asserted defenses to be frivolous.

On appeal, defendant argues that the trial court erred in construing the co-tenancy provision against defendant. Defendant contends specifically that (1) the court erred by failing to construe the lease addendum in its entirety, according to ordinary rules of construction, to resolve any apparent ambiguity before applying the rule that an ambiguous contract should be construed against its drafter, (2) the trial court clearly erred in finding that defendant was the drafter of the lease addendum, and (3) that in any event, the court erred in applying the rule that a contract

should be construed against its drafter where the contract was the product of extensive negotiations between the parties.

The primary goal in interpreting contracts is to determine and enforce the parties' intent. *Old Kent Bank v Sobczak*, 243 Mich App 57, 63; 620 NW2d 663 (2000). A cardinal principle of construction is that a contract is to be construed as a whole, and all parts are to be harmonized as far as possible. *Czapp v Cox*, 179 Mich App 216, 219; 445 NW2d 218 (1989). Every word must be taken to have been used for a purpose and no word should be taken as surplusage if the court can discover any reasonable purpose for it which can be gathered from the whole instrument. *Id.* In discerning intent, the actual mental processes of the parties are irrelevant. *Zurich Ins Co v CCR & Co (On Rehearing)*, 226 Mich App 599, 604; 576 NW2d 392 (1997). Rather, the law presumes that the parties understand the import of a written contract and had the intention manifested by its terms. *Id.* Further,

the rule that expressions will be interpreted against the party selecting and using them applies only where, after the ordinary rules of construction have been applied, the agreement is still ambiguous. The rule does not justify the taking or adopting of an isolated clause in dispute without examining the entire contract, the relations of the parties, their intention, and the circumstances under which they executed the contract. [17A Am Jur 2d, Contracts, § 348, p 363.]

See also Corbin on Contracts, § 559, pp 268-270.

If contractual language is clear and unambiguous, its meaning is a question of law that we review de novo on appeal. *Brucker v McKinlay Transport (On Remand)*, 225 Mich App 442, 448; 571 NW2d 548 (1997). If the meaning of an agreement is ambiguous or unclear, the trier of fact is to determine the intent of the parties. *UAW-GM v KSL Recreation Corp*, 228 Mich App 486, 492; 579 NW2d 411 (1998). We review factual findings for clear error. *Brucker, supra*. A contract is ambiguous if the language is susceptible to two or more reasonable interpretations. *D'Avanzo v Wise and Marsac, PC*, 223 Mich App 314, 319; 565 NW2d 915 (1997).

Here, the trial court erred in construing the co-tenancy provision against defendant on the basis that ambiguous contract language should be construed against the drafter. First, the trial court clearly erred in finding that defendant was the drafter of the addendum. The evidence showed that the final addendum, including the provision in question, although physically prepared by defendant, was the result of extensive negotiations between the parties and that both parties provided material terms. While evidence showed that defendant did provide the disputed language in the first sentence of the co-tenancy provision, the principle that ambiguous contract language should be construed against its drafter should not have been applied here, when the addendum was the product of extensive negotiations between the parties, and the apparent contradiction in the co-tenancy provision could be reconciled in light of the evident purpose and language of the provision as a whole. When considered in its entirety, the co-tenancy provision is most reasonably construed as proposed by defendant; defendant's construction harmonizes the entire provision, while plaintiff's construction renders a portion of the provision surplusage.

The obvious purpose of the major tenant co-tenancy provision is to define the rights and obligations of the parties if one or both of the major tenants, Witmark and Elder Beerman, were

to go out of business. While the first sentence establishes a “major tenant co-tenancy” requirement, it is the sentences that follow that specifically define the rights and obligations of the parties. The first sentence is fairly construed to mean that at least one of the major tenants must be in business on a continuous basis for the lease between the parties to be effective. The use of the word “fully” in the second sentence indicates that the co-tenancy requirement may be considered with regard to one or both tenants being open for business; if both are open for business, the requirement is fully satisfied. The second sentence then defines the rights and obligations of the parties if one of the major tenants closes. As the trial court found, the second sentence indicates that if one major tenant closes and is not replaced with another major tenant, as defined by the contract, defendant is entitled to partial rent abatement.

The last sentence of the co-tenancy provision defines the circumstances under which defendant would be relieved of its obligations under the lease. That sentence most clearly supports defendant’s interpretation that the co-tenancy requirement is unsatisfied if either of the major tenants closes, as it indicates that the parties contemplated relief under *two different* circumstances: (1) if the co-tenancy requirement remained unsatisfied for more than a year, or (2) and if both major tenants closed.¹ To accept plaintiff’s interpretation, that the co-tenancy requirement is unsatisfied only if both major stores are closed, would be to render the second alternative above superfluous. Construing the co-tenancy provision as a whole, we conclude that the intent of the parties was that if either major tenant closed and was not replaced, defendant was entitled to the appropriate rent abatement after a period of 120 days. Accordingly, the trial court clearly erred in construing the contract against defendant.

In light of our resolution of defendant’s issues on appeal, we need not address plaintiff’s issue on cross-appeal.

Reversed in part and remanded for entry of judgment in favor of defendant consistent with this opinion. We do not retain jurisdiction.

/s/ Jeffrey G. Collins
/s/ Joel P. Hoekstra
/s/ Hilda R. Gage

¹ The provision also requires that defendant demonstrate reduced sales.