

STATE OF MICHIGAN
COURT OF APPEALS

ESKY FASTTRACK CORPORATION,

Plaintiff-Appellee,

V

DEPARTMENT OF AGRICULTURE,

Defendant-Appellant.

UNPUBLISHED

June 17, 2003

No. 237951

Court of Claims

LC No. 00-017657-CM

Before: Markey, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Defendant appeals by right from the Court of Claim's denial of its motion for summary disposition under MCR 2.116(C)(10). We granted a stay of proceedings, and we now affirm.

Plaintiff and defendant were parties to a ten-year lease that allowed plaintiff to conduct auto racing and operate grandstand concessions at the Escanaba fairgrounds. Defendant changed the locks to the racetrack after plaintiff began to construct a motocross track. Plaintiff claimed it had permission to rough in the track, but defendant claimed that plaintiff's actions violated the lease. After defendant changed the locks, plaintiff's attorney wrote defendant that plaintiff interpreted defendant's lockout as a termination of the lease. Ultimately, defendant sent plaintiff a letter terminating the lease, and plaintiff sued for breach of contract. The Court of Claims denied defendant's motion for summary disposition and ultimately entered a \$96,000 judgment for plaintiff.

This Court reviews a trial court's ruling on a summary disposition motion de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Where the motion was granted under MCR 2.116(C)(10), this Court must consider the available pleadings, affidavits, depositions, and other documentary evidence in a light most favorable to the nonmoving party and determine whether the moving party was entitled to judgment as a matter of law. *Michigan Ed Employees Mut Ins Co v Turow*, 242 Mich App 112, 114; 617 NW2d 725 (2000), citing *Unisys Corp v Comm'r of Ins*, 236 Mich App 686, 689; 601 NW2d 155 (1999).

Generally, when deciding a motion for summary disposition under MCR 2.116(C)(10), a court cannot make findings of fact. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). The court's job is merely to review the record evidence and all its reasonable inferences and decide whether a genuine issue of any material fact exists to warrant a trial. *Id.* The moving

party has the burden of bringing evidence showing that there are no disputed facts. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). “The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists.” *Id.* All reasonable inferences are to be drawn in favor of the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). A court must be liberal in finding a genuine issue of material fact. *Lash v Allstate Ins Co*, 210 Mich App 98, 101; 532 NW2d 869 (1995). The motion should be granted only when the nonmoving party fails to present evidence that disputed facts exist. *Smith, supra*.

Defendant first claims that the court erred by denying its summary disposition motion because defendant was justified in terminating the lease. Defendant claims that plaintiff breached the lease first by undertaking construction without permission, not timely providing a race schedule, failing to undertake requested improvements, hiring underage workers, and violating a liquor law. In support of its motion for summary disposition, defendant presented, among other things, the deposition of plaintiff’s president, Carl Marcoe.

Opposing defendant’s motion for summary disposition, plaintiff submitted Marcoe’s affidavit. Both the deposition and the affidavit demonstrated that there were genuine issues of material fact surrounding defendant’s allegations. For instance, Marcoe claimed that defendant’s agents knew of and approved the motocross track, that he had discussed the track several times with the fairgrounds manager, and that the fairgrounds’ board had specifically planned a motocross event for the next fair. Marcoe also claimed that the proposed race schedule was not late, a claim that is supported by the plain language of the lease. Further, Marcoe claimed that defendant willingly continued the lease after the 1997 liquor violation and the 1998 hiring of a race official’s two sons to pick up trash after two races. Last, Marcoe asserted that he disagreed with the requested track improvements and was not required to proceed with the improvements because plaintiff’s insurer had deemed the track safe and further improvements were unreasonable.

Based on plaintiff’s evidence, summary disposition would have been inappropriate. Only where there is no indication of a genuine issue of material fact may summary disposition be granted. *Smith, supra* at 455; *Lash, supra* at 101-102. Plaintiff presented genuine issues of material fact that defendant’s stated reasons for terminating the lease were not justified.

Defendant next argues that it anticipated plaintiff’s repudiation of the lease because of a letter from plaintiff’s attorney dated April 21, 1999. The letter, written in response to defendant’s maintenance demands and defendant’s locking plaintiff out of the premises, stated that locking plaintiff out was a breach of the lease, an eviction, and “effectively terminate[d] the lease at a significant financial loss to the lessee.” Plaintiff presented evidence that defendant had allowed plaintiff unfettered access to the racetrack since 1996 and that access was crucial to maintaining the track and operating concessions.

The lease, while silent on the precise matter of whether defendant was to provide plaintiff with a key, stated that plaintiff “may utilize” the grandstand and racetrack areas. The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties. *D’Avanzo v Wise & Marsac, PC*, 223 Mich App 314, 319; 565 NW2d 915 (1997). Where the language of a contract is clear and unambiguous, construction of the terms is a question of law for the court.

Id. However, where the meaning is “‘obscure and its construction depends upon other and extrinsic facts in connection with what is written, the question of interpretation should be submitted to the jury’” *Id.*, quoting *Hewett Grocery Co v Biddle Purchasing Co*, 289 Mich 225, 236; 286 NW 221 (1939), quoting *O’Connor v March Automatic Irrigation Co*, 242 Mich 204, 210; 218 NW 784 (1928).

Thus, plaintiff successfully demonstrated that there was a genuine issue of material fact for a trial surrounding its right to access to the racetrack. If defendant was obliged to ensure that plaintiff had unfettered access, then defendant’s act of changing the locks may be a breach of the parties’ agreement. And, if defendant breached the agreement, then plaintiff’s letter was not an anticipatory repudiation, and summary disposition was improper. Therefore, the trial court did not err by denying defendant’s motion to dismiss plaintiff’s claim. “When credibility is at issue, summary disposition rarely is appropriate.” *Harrison v Olde Financial Corp*, 225 Mich App 601, 606 n 5; 572 NW2d 679 (1997), citing *Metropolitan Life Ins Co v Reist*, 167 Mich App 112, 121; 421 NW2d 592 (1988).

We affirm.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Kurtis T. Wilder