

STATE OF MICHIGAN
COURT OF APPEALS

OVENS, LLC and SWEET ONION, INC.,

Plaintiffs-Appellants,

v

QUALITY ACQUISITIONS, LLC and CITY OF
PORTAGE,

Defendants-Appellees,

and

HOOTERS OF KALAMAZOO, INC.,

Defendant.

UNPUBLISHED

October 28, 2003

Nos. 236800, 238885

Kalamazoo Circuit Court

LC No. 01-000089-CK

Before: Cooper, P.J., and Fitzgerald and Kelly, JJ.

PER CURIAM.

Plaintiffs, Ovens, LLC and Sweet Onion, Inc., own a Bennigan's restaurant in the city of Portage.¹ They filed suit against defendants, Quality Acquisitions, LLC and Hooters of Kalamazoo, Inc, requesting a permanent injunction and alleging breach of contract and offset and/or reimbursement. Bennigan's complaint was later amended to add claims against defendants for trespass and breach of the covenant of quiet enjoyment. Hooters and Bennigan's are tenants on adjacent parcels of land, which are both owned by Quality. Bennigan's, believing it had exclusive use of its leased premises, wanted to preclude access to Hooters' parking lot through Bennigan's parking lot and to preclude Hooters' customers and employees from parking in spaces within Bennigan's leased premises. Bennigan's also alleged that a portion of Hooters' building constituted a trespass on Bennigan's leased premises. The city of Portage was later added as a defendant. Bennigan's alleged that the city's actions with respect to Hooters' site plans constitute an unconstitutional taking of property. In Docket No. 236800, Bennigan's appeals as of right, challenging the trial court's order granting summary disposition in favor of

¹ Plaintiffs are hereinafter referred to collectively as Bennigan's.

Quality and the city. In Docket No. 238885, Bennigan's appeals as of right, challenging the trial court's order awarding attorney fees and costs to Quality under a term of the lease. We affirm in part and reverse in part.

FACTS

On April 20, 2000, Quality leased property to Bennigan's for ten years with four, five-year options to extend. The property was part of a parcel of land owned by Quality and zoned by the city of Portage as commercial planned development (CPD) property. The other portion of Quality's property, which was adjacent to, and south of, the portion leased to Bennigan's, was leased to a Gander Mountain store.

Bennigan's lease contains a legal description of the property. The site plan for the Bennigan's restaurant was prepared using this identified, metes and bounds description. Bennigan's corporate policy requires a minimum of 125 parking spaces for each restaurant. Bennigan's requested one hundred parking spaces on its leased site and twenty-five parking spaces offsite by Gander Mountain. The signed lease addressed the issue of parking in two provisions:

Article II, Premises, § 2.2, Parking:

The parking lot on the Leased Premises shall be subject to use by customers and employees of the business in the "Proposed Building" shown on Exhibit C, which is west of Steak and Shake. Tenant's customers and employees shall also be entitled to use the two parking lots on the "Proposed Building" parcel, one of which is immediately east of the "Proposed Building" and one of which is immediately south of the "Proposed Building".

The lease further provided:

Article XII, Condemnation, § 12.4, Parking Reductions:

Any Taking which results in less than 100 parking spaces being available on the Premises or 125 parking spaces being available on the Premises and the "Proposed Building" property, shall allow Tenant to terminate this Lease.

The lease defined the "premises" as the "property described on the attached Exhibit A," which contained a map and a metes and bounds description of the leased parcel. The "'Proposed Building' property" is not defined in the lease, but the proposed building shown on Exhibit C to the lease is the Gander Mountain building. According to the terms of the lease, Bennigan's was responsible for maintenance and insurance for the parking lot on its premises.

At the time the lease was signed Bennigan's was aware that Quality was negotiating with the city of Portage to buy a vacant parcel of land north of, and adjacent to, the parcel being leased to Bennigan's. According to Bennigan's, Quality never indicated that access to the vacant parcel, if obtained, would be solely through Bennigan's parking lot, nor did Quality inform Bennigan's that it might be required to share its onsite parking spaces with any tenant of that property.

Before Bennigan's began construction on its leased premises, a site plan was submitted to the city for approval. On April 28, 2000, the city informed Bennigan's and Quality that the submitted site plan would have a better chance of being approved if it contained a notation relating to future access to the city-owned parcel. An area in the plan was marked as a "future access easement." The city subsequently approved the site plan on June 1, 2000. Once a site plan is approved, construction must conform to it and deviations may be made only with approval. Bennigan's site plan showed one future access point to the vacant parcel. The city acknowledged, however, that the city does not have authority to require access to a city property through private property.

The city council approved Quality's purchase of the vacant parcel on July 11, 2000. Hooters signed a lease with Quality for the vacant parcel on August 23, 2000, and then started the process to have its conceptual and site plans approved by the city. Hooter's lease specifies that parking is permissible anywhere on the combined development. Hooter's site plan was approved on November 2, 2000, and showed two access points from Bennigan's parking lots to Hooters' lot. It contained only forty-six parking spaces on Hooters' premises, which is well below Hooters' franchise requirements. Hooters' approved site plan showed Hooters' cooler pad and loading zone over the property boundary onto premises that Bennigan's claimed under its lease.

The cooler pad was later built pursuant to Hooters' site plan. An encroachment survey revealed that Hooters' cooler pad was encroaching 3.85 feet south of Bennigan's north property line and ran a distance of forty-three feet. It was two feet away from the defined parking lot being used by Bennigan's.

Bennigan's opened for business in November 2000. In February 2001, before Hooters was finished with construction, Bennigan's filed its complaint. It also moved for a temporary restraining order and a preliminary injunction. At the first hearing on the motion for a temporary restraining order, the parties reached a temporary agreement that Hooters' construction equipment and traffic would not cross Bennigan's parking lot and that Bennigan's parking lot would not be used for construction parking. Temporary barriers were placed to prevent people from driving through two openings that were left by Quality when it created Bennigan's parking lot. Bennigan's later renewed its motion for a temporary restraining order, claiming that the agreement was being violated. The trial court denied the request for a temporary restraining order.

A lengthy preliminary injunction hearing was held in April 2001. Quality admitted that Bennigan's lease does not contain an agreement granting Hooters the right of ingress/egress over Bennigan's property and that there was no reservation of an easement in Bennigan's lease. Quality further admitted that, before Bennigan's signed its lease in April 2000, Bennigan's was never informed that the only access to the north parcel would be through Bennigan's lot. In addition, although Quality was aware that parking was an important consideration for Bennigan's, Quality failed to tell Bennigan's that the north parcel tenant would be allowed parking on Bennigan's premises. At the time Bennigan's lease was signed, Quality did not own the Hooters' property, and Bennigan's lease was never modified to include Hooters after Quality bought the vacant property. The terms of Bennigan's lease indicate that it can only be changed by written agreement. Quality stated, however, that the entire area, which includes Gander Mountain, Bennigan's, and Hooters, has more than three hundred available parking spaces. And,

while Bennigan's lease does not grant Hooters any parking rights or refer to Hooters at all, it conversely does not restrict Bennigan's onsite parking to Bennigan's patrons only.

The trial court denied Bennigan's request for the preliminary injunction, and summary disposition was later granted for all of the defendants.

Docket No. 236800

I

Bennigan's first argues that the trial court erred by granting summary disposition in favor of Quality on Bennigan's claims for injunctive relief and for breach of the covenant of quiet enjoyment. This Court reviews a trial court's grant of summary disposition de novo even where relief in equity is sought. See *Rose v Nat'l Auction Group, Inc*, 466 Mich 460, 461; 646 NW2d 455 (2002).

A. The cross-access agreement

In denying Bennigan's request for a preliminary injunction, the trial court made findings of fact and ruled, in relevant part:

Only one conclusion can be drawn from the various communications between plaintiff [Bennigan's] and defendant in these exhibits, namely that defendant wanted and plaintiff understood that defendant's design concept for the development called for a regular flow of people and traffic across the parcel boundaries of all tenants. No tenant was to have exclusive right to any portion of the site. Language used in letters and legal documents was not intended to create legal rights contrary to this. There was never an attempt to provide to a tenant a legal description of a parcel to which it would have exclusive access. Descriptions and drawing of boundaries varied and was no more than descriptive of the area within which a tenant had a right to build a building. The actions of the parties revealed their understanding that there was fluid access within the project and lack of exclusivity, whether it was described as "cross access", "shared/cross access", "easements", or "future access easement."

In ruling on the subsequent motion for summary disposition, the trial court stated:

Plaintiff's claim to relief in this count [for permanent injunction] against both defendants [Hooters and Quality] is based on its allegation in paragraphs 23-26 of the amended complaint. Plaintiffs claim that they have a right to exclusive possession of the lease premises, with no ingress or egress across.

The court incorporates the law related to preliminary injunctions which was cited in its opinion on the request for preliminary injunction. It is also noted that injunctive relief is available only where (1) justice requires it; (2) there is no adequate remedy at law; (3) there is a threat of imminent danger of irreparable injury. *Peninsula Sanitation, Inc v City of Manistique*, 208 Mich App 34 (1994).

The court has decided these issues and facts against the plaintiff's position when the request for a preliminary injunction was decided. Plaintiffs are not entitled to the exclusivity they claim. No irreparable harm exists. Extensive discovery has been conducted of every principal involved in these proceedings, and they testified at the preliminary hearing. Nothing the plaintiff has submitted contradicts the previous conclusion of the court. To the extent that Mr. Hansen's [Bennigan's] affidavit suggests any contrary facts so as to raise a disputed issue of fact, the court rejects them. The contradictions are not reasonably explained. His testimony at the preliminary hearing, therefore, is preferred. It was given at a time before the court offered any opinion about the claims of either party, and it is therefore more believable than testimony now offered after the court has rendered a preliminary opinion in favor of defendant's position. The court finds the affidavit self-serving, not believable, and therefore not entitled to the benefit of every reasonable doubt.

Bennigan's lease was signed before Quality had an offer pending with the city for the vacant parcel of land. Bennigan's lease makes no mention of the vacant parcel or access to it. The lease defines the "premises" as an entire area described by metes and bounds, including parking lots, and not just as the area where the building will be placed. Further, the lease indicates that the premises "shall be used" for the first two years "for the operation of a Bennigan's restaurant." The lease makes no mention of accommodating any other future restaurant. The only express reservation of rights by Quality in the premises is found in ¶ 2.1, where Quality reserved the right to install, maintain, use, repair and replace utility lines and wires in portions of the "premises not occupied by the Tenant's building." Nothing in the lease reserves access lanes for the neighboring property. Further, under the lease, Bennigan's is solely responsible for real estate taxes and insurance for the entire premises. The lease also contained an integration clause:

This lease is intended by the parties as a final expression of their agreement and as a complete and exclusive statement of the terms thereof, all negotiations, considerations and representations between the parties having been incorporated herein. No course of prior dealings between the parties or their officers, employees, agents, or affiliates shall be relevant or admissible to supplement explain or vary any of the terms of this Lease. Acceptance of or acquiescence in, a course of performance rendered under this or any prior agreement between the parties or their affiliates shall not be relevant or admissible to determine the meaning of any of the terms of this Lease. No representations, understanding, agreements, warranties or promises with respect to the premises or the building or with respect to past, present or future tenancies, rents, expenses, operations or any other matter have been made or relied upon in the making of this Lease other than those specifically set forth herein. This lease can be modified only by a writing signed by Landlord and Tenant.

The trial court's reliance on extrinsic evidence, specifically letters and legal documents, to conclude that the lease did not bestow any exclusivity in the premises was an error of law. *Michigan Nat'l Bank v Laskowski*, 228 Mich App 710, 714; 580 NW2d 8 (1998). Parol evidence was impermissible to explain, change, or alter the plain, unambiguous language of the contract.

The language of the lease clearly defined the premises and set out one minor reservation in the premises. The lease made no mention of a cross-access agreement with a neighboring property, nor did it include a reservation for potential cross-access. Quality admitted at the preliminary injunction hearing that nothing in Bennigan's lease grants Hooters the right of ingress or egress over Bennigan's premises and that there was no reservation of such a right. The lease makes reference to a sharing of property only with respect to the use of a common driveway from Westnedge Road to West Fork Crossing. Nothing in the lease supports the trial court's finding that the premises specified in the lease describe an area only for taxation and insurance purposes. The use of parol evidence by the trial court to reach a conclusion that the parties understood that there was no exclusivity in the leasehold was improper.

The integration clause specifically indicates that acquiescence in, or acceptance of, a course of performance is not relevant to determine the meaning of the lease. Thus, Quality is prohibited from relying on the "future access easement" notation in Bennigan's site plan, which was drawn after the lease was signed, to support its assertion that Bennigan's was obligated to provide access for the north parcel. More importantly, parol evidence could not be used to dispute that the contract was not really integrated despite the integration clause. Where a contract contains an integration clause, parol evidence is not admissible to demonstrate that the contract is not integrated. *UA –GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 493-497; 579 NW2d 411 (1998).

The plain language of the contract provided exclusivity except as otherwise specified in the contract. A "lease gives the tenant the possession of the property leased and the exclusive use or occupation of it for all purposes not prohibited by the terms of the lease." *De Bruyn Produce Co v Romero*, 202 Mich App 92, 98; 508 NW2d 150 (1993). The language of the integrated lease in this case refutes the trial court's conclusions that there was no exclusivity and that there was never any intention "to provide to a tenant a legal description of a parcel to which it would have exclusive access." The trial court's finding that the boundaries in the lease were "no more than descriptive of an area within which the tenant had a right to build a building" is also not supported by the plain language of the lease or by prevailing law. The trial court, in granting summary disposition, engaged in impermissible fact finding and improperly viewed the evidence in a light favorable to the moving party. *Steward v Panek*, 251 Mich App 546, 555; 652 NW2d 232 (2002).

While Bennigan's clearly had some expectations of exclusivity in the leased premises, the lease contained the following paragraph:

Tenant shall comply with and shall cause the Premises to comply with all current or hereafter enacted statutes, laws, rules, orders, regulations and ordinances affecting the Premises or any part or the use thereof. [Lease, ¶ 4.4.9.]

The city of Portage's access management ordinance provides, in relevant part:

It is the purpose of this Chapter to provide the procedures and standards necessary to protect the public health, safety and welfare. The objectives and purposes of the Chapter are the following: a) maintaining smooth traffic flow, b) minimizing land access, and traffic movement conflicts, c) reduce traffic conflicts associated with driveways along major streets, d) reducing accident frequency

and/or severity, e) lessening congestion by reducing conflicting traffic movements, f) providing reasonable access, g) encouraging orderly development that is conscious of other uses, h) addressing energy consumption, air pollution concerns and i) protecting the public investment in the street system. [Portage Ordinance, § 1024.01.]

Section 1024.09 of the ordinance further provides that “no more than one access shall be provided to an individual parcel or to contiguous parcels under the same ownership” except where an applicant demonstrates a substantial need for additional access.

Portage Ordinance, § 1024.13, provides:

A vehicular connector between two (2) abutting parcels or lots may be required so as to lessen congestion at individual access points, to accommodate traffic circulation, to insure safety and convenience of vehicular traffic with relation to the site and access streets. The connector between the parcels shall conform to the maneuvering lane requirements of Chapter 1288 of these Codified Ordinances. Vehicular connections may be required in locations where a service drive cannot be developed or is not needed or planned.

A lessee’s property interest rights are limited to the rights possessed by the property lessor. *Adams Outdoor Advertising v East Lansing (After Remand)*, 463 Mich 17, 24; 614 NW2d 634 (2000). It is fundamental property law that a lessor can transfer no greater rights than he possesses. *Id.* In this case, the lessor had no absolute right to prohibit access in violation of city ordinances. The plain language of the lease acknowledges that Bennigan’s agrees to comply with ordinances. Thus, if the city required access from Bennigan’s leased premises to the Hooters’ leased premises under its ordinances, Bennigan’s may not succeed in its request for a permanent injunction prohibiting access. While the trial court heard evidence related to the ordinances, issues of fact remain unresolved. There was no unequivocal testimony that the city was requiring access from Bennigan’s parcel through Hooters’ parcel based on any ordinances. Further, there was no testimony that two access points, as opposed to one as noted in Bennigan’s site plan, were being required pursuant to any ordinance. Whether the cited ordinances applied, if they required access and, if so, whether two access points were required, are unresolved issues of fact. Summary disposition on the issue was inappropriate where material questions of fact remain unresolved.²

² Quality’s argument that Bennigan’s never timely challenged the existence of two access openings is fallacious. Bennigan’s was aware that two access points were shown on Hooters’ proposed plan. It did not specifically oppose them. However, there is no allegation that the complaint in this case was untimely or that the claims raised are barred under any statute of limitations. The evidence at the preliminary injunction hearing supported that, before Hooters’ site plan was approved by the city, Bennigan’s raised issues related to traffic flow and parking. Bennigan’s specifically informed Quality, Hooters and the city of Portage that there was no cross-access agreement or parking agreement.

B. The covenant of quiet enjoyment and the two access points

Bennigan's alleged a breach of the covenant of quiet enjoyment based, in part, on the increased traffic flow that providing access to Hooters would create. In dismissing this claim, the trial court did not squarely address whether the inclusion of two access points violated the covenant of quiet enjoyment.

The covenant of quiet enjoyment is breached only when the landlord "obstructs, interferes with, or takes away from the tenant in a substantial degree the beneficial use of the leasehold." *Slatterly v Madiol*, 257 Mich App 242, 258; 668 NW2d 154 (2003). The lease between Bennigan's and Quality contained an express covenant of quiet enjoyment:

Landlord covenants that is [sic] full right, power and authority to make this Lease and that Tenant, on paying all of the Rent and performing all of the Tenant's other obligations in the Lease, shall peaceably and quietly have, hold and enjoy the Premises during the Term without hindrance, ejection or molestation by any person lawfully claiming by, through or under Landlord, subject, however, to all Mortgages, encumbrances and easements to which this Lease may be or become subject and subordinate, from time to time.

At the preliminary injunction hearing, testimony concerning damages related to cross-access was heard. Whether the covenant of quiet enjoyment was breached, however, cannot be resolved until the issue of the two access points is resolved. The trial court failed to acknowledge any issues of fact with respect to the alleged breach of the covenant of quiet enjoyment as it related to cross-access. It simply indicated that because there was no exclusive right to the premises, the claim would be dismissed. Summary disposition was improper.

C. Bennigan's claims related to shared parking

Bennigan's also alleged a breach of the covenant of quiet enjoyment based, in part, on the loss of available parking for Bennigan's customers. As previously discussed, the trial court erred in considering parol evidence to conclude that Bennigan's did not have exclusive use in the metes and bounds premises leased under the lease agreement. A tenant has exclusive use in the premises for all purposes not otherwise restricted by the terms of the lease. *DeBruyn, supra* at 98. The executed lease did not permit use of Bennigan's parking lot by anyone other than the Gander Mountain employees and customers. Paragraph 2.2 of the lease specified:

The parking lot on the Leased Premises shall be subject to use by customers and employees of the business in the "Proposed Building" shown on Exhibit C, which is west of Steak and Shake. Tenant's customers and employees shall also be entitled to use the two parking lots on the "Proposed Building" parcel, one of which is immediately south of the "Proposed Building."

There was no reservation of parking on Bennigan's leased premises for any future tenant of the neighboring parcel that Quality had not yet obtained. The plain language of Bennigan's lease

does not support a finding that Bennigan's agreed at any time to a joint or common parking lot with Hooters.

Unlike the access management ordinance that requires cross-access to abutting parcels in certain situations, there was no evidence that a law, ordinance, statute, or other authority specifically required Bennigan's to share its parking with a neighboring leaseholder where the lease itself did not provide for cross-parking. Quality was not entitled to judgment as a matter of law with respect to cross-parking based on the unambiguous language of the lease.

II

Bennigan's argues that summary disposition on the claim of trespass by encroachment was improper.

In its complaint, Bennigan's alleged that Quality and Hooters brought construction equipment onto Bennigan's leased premises, dug a trench, poured concrete footings, and erected concrete walls. A survey of the leased premises confirmed that the encroachment was 3.85 feet over the property line and ran forty-three feet in length. After the trench was excavated, but before any other construction occurred, Bennigan's complained orally and filed an emergency motion for a temporary restraining order. Nevertheless, the construction continued. Bennigan's further alleged in its complaint that the defendants' actions constituted a continuing trespass. It requested a permanent injunction enjoining construction equipment and vehicles from entering Bennigan's leased premises and ordering removal of the encroachments. It also requested remedies under MCL 600.2918 and MCL 600.2919, including but not limited to treble damages for the removal of soil. And, it requested any other relief "deemed just."

The trial court granted summary disposition in favor of Quality, finding that any intrusion on Bennigan's premises was de minimis and did not interfere with Bennigan's business.

The trial court made mistakes of law when deciding the issue of trespass on summary disposition. In *Adams v Cleveland-Cliffs Iron Co*, 237 Mich App 51; 602 NW2d 215 (1999), this Court extensively discussed the doctrines of trespass and nuisance.

Trespass is an invasion of the plaintiff's interest in the exclusive possession of his land, while nuisance is an interference with his use and enjoyment of it. Historically, "[e]very unauthorized intrusion upon the private premises of another is a trespass" Because a trespass violated a landholder's right to exclude others from the premises, the landholder could recover at least nominal damages even in the absence of proof of any other injury. Recovery for nuisance, however, traditionally required proof of actual and substantial injury. Further, the doctrine of nuisance customarily called for balancing the disturbance complained of against the social utility of its cause.

Traditionally, trespass required that the invasion of the land be direct or immediate and in the form of a physical, tangible object. [*Id.* at 59-60.]

This Court further discussed the current erosion of the distinction between trespass and nuisance, noting the "so-called modern view," which prohibits an award of damages for trespass unless

actual and substantial damages are sustained. *Id.* at 62-63. It further noted modern requirements that damages should be weighed against the social utility of the activity causing them. *Id.* at 63. It ruled:

We do not welcome this redirection of trespass law toward nuisance law. The requirement that real and substantial damages be proved, and balanced against the usefulness of the offending activity, is appropriate where the issue is interference with one's use or enjoyment of one's land; applying it where a landowner has had to endure an unauthorized physical occupation of the landowner's land, however, offends traditional principles of ownership. The law should not require a property owner to justify exercising the right to exclude. To countenance the erosion of presumed damages in cases of trespass is to endanger the right of exclusion itself. [*Id.* at 63-64.]

In its decision, this Court did not limit trespass to owners of land, but used the terms "possessor of land" and "landholder" as well. A lessee is a possessor or landholder. It has exclusive possession during the terms of its lease. *DeBruyn, supra* at 98.

In *Adams, supra*, 237 Mich App 67, this Court ultimately held:

Recovery for trespass to land in Michigan is available only upon proof of an unauthorized direct or immediate intrusion of a physical, tangible object onto land over which the plaintiff has a right of exclusive possession. Once such an intrusion is proved, the tort has been established, and the plaintiff is presumptively entitled to at least nominal damages.

In addition to nominal damages, a plaintiff who establishes a trespass may recover any additional, actual damages proved. *Id.* at 72. In sum:

Trespass in Michigan remains a distinct doctrine providing a remedy for violation of a distinct property right. A possessor of land proving a direct or immediate intrusion of a physical, tangible object onto the land is presumptively entitled to recover at least nominal damages even absent any proof of actual injury and may recover additional damages for any injuries actually proved. [*Id.* at 73.]

Injunctive relief for a trespass may also be appropriate. In *Kratze v Independent Order of Oddfellows*, 442 Mich 136, 149; 500 NW2d 115 (1993), the Court discussed the possibility of injunctive relief:

"In such cases the approach is to balance several factors – the relative hardship to the parties and the equities between them – and to grant or deny the injunction as the balance may seem to indicate."

This Court has long recognized that "it will examine into all the circumstances of the case, and, if it is apparent that the relief sought is disproportioned to the nature and extent of the injury sustained, or likely to be, the

court will not interfere but will leave the parties to seek some other remedy.” [*Id.* at 142-142 (citations omitted).]

Generally, unless the burden to the defendant of removing the challenged encroachment is disproportionate to the hardship to the plaintiff in allowing the encroachment to remain, an injunction will issue. *Id.* at 144. In *Kratze*, a slight encroachment that did not interfere with the possessor’s ability to use the land, and about which the possessor was aware, did not outweigh the hardship of removal to the encroaching party. *Id.* at 146-148. A court, however, is not bound to engage in the balancing of hardships and equities if the encroachment results from an intentional or willful act. *Id.* at 145. An injunction will ordinarily be granted to compel removal of an encroachment by an adjoining landowner if the encroachment is intentional or willful. *Id.* at 145 n 10, citing *Sokel v Nickoli*, 347 Mich 146; 79 NW2d 485 (1956).

If the encroachment is not intentional or willful, monetary relief, other than nominal damages, may be sought. In *Kratze*, the Court indicated that where a trespass to property results in injury to the land, the general measure of damages is the diminution in value of the property if the injury is permanent or irreparable. *Id.* at 149.

If the injury is reparable, or temporary, the proper measure of damages is the cost of restoration of the property to its original condition, if less than the value of the property before the injury. The rule is, however, flexible in its application. The ultimate goal is compensation for the harm or damage done. Thus, whatever method is most appropriate to compensate a plaintiff for the loss may be used.

. . . Several factors are used to determine whether the trespass is permanent or temporary. . . . [*Id.*]

Where the trespass is permanent, the correct measure of damages is the diminution of the value of the property itself as represented by the value of the property without the encroachment, minus the value of the property with the encroachment or, alternatively, the value of the strip of land on which the building sits. *Id.* at 150.

In this case, there was an encroachment on Bennigan’s leased premises. The trial court agreed that the footings and wall were on Bennigan’s property. It determined, however, that the intrusion was de minimis. However, because Bennigan’s offered undisputed proof of a direct intrusion of a physical, tangible object on the leased property, it was entitled to nominal damages and any additional damages actually proven. The trial court erred as a matter of law by refusing to entertain even nominal damages. Further, the trial court improperly denied injunctive relief, finding that the encroachment was de minimis and that any hardships were disproportionate to Hooters and Quality. There was a question of fact with respect to whether the encroachment was willful and intentional. If the encroachment was willful and intentional, injunctive relief is generally appropriate. *Kratze, supra* at 145, n 10.

Although there is no question that there was a trespass by a tangible object, summary disposition in favor of Bennigan’s on the trespass claim is not appropriate. There were questions of fact with respect to whether Bennigan’s consented to the trespass. The trial court noted, in its opinion, that Bennigan’s was aware of the intrusion. Consent is a defense to trespass. *American*

Transmission, Inc v Channel 7 of Detroit, Inc, 239 Mich App 695, 705-706; 609 NW2d 607 (2000). A trial court may not, however, weigh the evidence, make factual findings, or resolve credibility issues on a motion for summary disposition. *Lysogorski v Charter Twp of Bridgeport*, 256 Mich App 297, 299; 662 NW2d 108 (2003). If evidence conflicts, summary disposition is improper. *Id.* There was conflicting evidence in this case. The site plan for Hooters did not show a cooler pad over the property line, but the approved plan, however, showed the encroachment. Bennigan's testified that it never consented to the encroachment. However, evidence was presented that Bennigan's indicated it would agree to support the site plan if parking changes and boundary lines were changed.

Bennigan's argues that it is entitled to treble damages. It cites to MCL 600.2919 and one case, but fails to explain or rationalize its position. It is improper for an appellant to announce its position and fail to discover or rationalize the basis of the claim with little or no citation to authority. *Houghton v Keller*, 256 Mich App 336, 339; 662 NW2d 854 (2003). The issue is abandoned. *Id.* Bennigan's makes no argument that it is entitled to relief under MCL 600.2918, as pleaded in its complaint.

III

Bennigan's argues that summary disposition was improperly granted to Quality on Bennigan's breach of contract claim.

Bennigan's alleged that its employees were "denied parking on the Gander Mountain property by Gander Mountain and, as a result, [its] employees have had to park on the leased premises and on other less secure locations, resulting in a substantial number of break-ins in employee automobiles and a reduction to Plaintiff's parking." Bennigan's requested that Quality provide "other conveniently located parking spaces of sufficient quantity to accommodate" Bennigan's employees. It further sought compensation for its employees for damages sustained to their personal property.

Quality moved for summary disposition, arguing that it did not prohibit Bennigan's employees or customers from parking in any spaces and that it had no obligation to pay Bennigan's employees for property damage. The trial court held:

Plaintiff's claim to relief on this count is in paragraphs 27-29 of the amended [complaint]. First the court notes that plaintiff claims that an adjoining tenant has denied it parking privileges on what it considers its leased parcel, not that QA has done so. Moreover, this Court has rejected plaintiff's claim that the lease entitles it to any exclusive rights to the premises. Finally, Mr. Hansen has testified that plaintiff has not been denied the parking rights for which it bargained. Therefore, defendant's motion on this count is granted.

The trial court's ruling misconstrues Bennigan's complaint. Bennigan's did not allege that Gander Mountain denied Bennigan's parking on what Bennigan's "considers its leased parcel." Bennigan's alleged that Gander Mountain denied Bennigan's parking in Gander Mountain's parking lot. Bennigan's lease, ¶ 2.2, allowed Bennigan's to use the parking lots adjacent to the Gander Mountain building.

Despite errors in the trial court's ruling, the trial court reached the correct result when it granted summary disposition for Quality. Regardless of the rationale for the trial court's decision, reversal is not necessary if summary disposition was warranted. *Estate of Cara Mitchell v Dougherty*, 249 Mich App 668, 680, n 5; 644 NW2d 391 (2002). Summary disposition is proper on a breach of contract claim where there is no issue of material fact regarding any breach of duty through a failure to exercise ordinary care in performing under the contract. See, e.g., *Joyce v Rubin*, 249 Mich App 231, 246; 642 NW2d 360 (2002). In this case, there was no evidence that Quality, the contracting party, breached the lease contract. Hansen's affidavit supports that Quality did not prohibit Bennigan's employees from parking in lots designated under the contract and, when Gander Mountain attempted to interfere with Quality's right to park pursuant to the lease, Quality sent a letter to Gander Mountain. It warned Gander Mountain not to tow the cars of Bennigan's employees. After more threats from Gander Mountain, Quality sent an additional letter. There was no evidence that any cars were towed. Further, the plain and unambiguous language of the lease did not specify specific spaces or locations in the Gander Mountain lots. In sum, there was no evidence that Quality breached the lease. The trial court properly granted summary disposition on the breach of contract claim.

IV

Bennigan's contends that summary disposition of its claim for breach of the lease was improperly granted because Quality breached the lease when it failed to timely complete certain parking lot construction and landscaping. It contends that it is entitled to a trial on the issue of damages. Bennigan's cites no authority to support that it was entitled to a trial on damages. A party may not merely announce its position and leave it to this Court to explain and rationalize that position. *Houghton, supra* at 339. Moreover, Bennigan's failed to plead a cause of action for breach of contract, or request contract damages, with respect to the untimely performance of the work under the lease contract. It simply alleged that the work was not completed, that it planned to perform the work itself, and that it wanted to be reimbursed or have the amount offset from other amounts owing under the lease contract. On appeal, however, Bennigan's admits that Quality completed the site work. Summary disposition on the claim as pleaded was appropriate where there was no evidence that Bennigan's was entitled to the requested relief.

V

Bennigan's argues that the trial court improperly granted summary disposition of the claim for breach of quiet enjoyment with respect to construction traffic and the Gander Mountain parking situation.³ Because Bennigan's did not plead a breach of the covenant of quiet enjoyment with respect to construction traffic or the alleged Gander Mountain parking situation, defendant waived the claim and this issue is not properly before this Court. *Williams v Nevel's-Jarrett Associates, Inc*, 171 Mich App 119, 121; 429 NW2d 808 (1988).

³ We have already addressed whether there was a breach of the covenant of quiet enjoyment based on cross-access and cross-parking.

VI

Bennigan's asserts that the trial court erred by failing to allow Bennigan's an opportunity to amend its complaint to plead special damages. Bennigan's neither pleaded nor offered proof of any special damages. The issue is abandoned because of the cursory treatment given, without any rationalization or explanation as to why amendment should be allowed. *Houghton, supra* at 339. Moreover, the issue has no merit even if it is considered. MCR 2.116(I)(5) provides that the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118 if summary disposition is granted under subsections (C)(8), (9), or (10). MCR 2.118(A)(2) provides for amendment "only by leave of the court or by written consent of the adverse party." Bennigan's never sought leave to amend its complaint to plead special damages. There is no requirement that a trial court sua sponte instruct a party to amend. Moreover, a trial court does not need to even grant leave to amend upon proper request if it finds undue delay, bad faith, dilatory motive on behalf of the movant, repeated failures to cure deficiencies in previous amendments, undue prejudice to the opposing party, or futility. *Madejski v Kotmar, Ltd*, 246 Mich App 441, 448-449; 633 NW2d 429 (2001). Because Bennigan's never offered a proposed third amended complaint, the trial court could not determine whether such an amendment should be permitted. There exists no plain error in the trial court's failure to sua sponte instruct Bennigan's to amend its complaint.

VII

Bennigan's contends that the trial court improperly granted summary disposition of its claim that the city violated MCL 125.584d(3), thereby perpetrating a taking without just compensation. Questions of statutory interpretation are questions of law that are reviewed de novo. *Stone v Michigan*, 467 Mich 288, 291; 651 NW2d 64 (2002).

In Bennigan's second amended complaint, it added a count against the city. Bennigan's alleged that it commenced development of its restaurant based on the approval of its site plan and that the city later authorized or directed development of Hooters, giving it sole access through Bennigan's property. Bennigan's also alleged that the city, without Bennigan's consent, approved construction of a part of Hooters on Bennigan's leasehold. Bennigan's also alleged that the changes in its site plan were made without its approval, contrary to MCL 125.584(d).

Bennigan's now argues that the approval of Hooters' site plan, which changed Bennigan's site plan, violated MCL 125.584(d). That statute provides:

(1) As used in this section, "site plan" includes the documents and drawings specified in the zoning ordinance necessary to insure that a proposed land use or activity is in compliance with the local ordinance and state and federal statutes.

(2) Submission and approval, specifications of zoning ordinances. A city or village may require the submission and approval of a site plan before authorization of a land use or activity regulated by a zoning ordinance. The zoning ordinance shall specify the body, board, or official charged with reviewing site plans and granting approval.

(3) Record of approval. *If a zoning ordinance requires site plan approval, the site plan, as approved, shall become part of the record of approval, and subsequent actions relating to the activity authorized shall be consistent with the approved site plan, unless a change conforming to the zoning ordinance receives the mutual agreement of the landowner and the administrative official or body which initially approved the site plan.*

(4) Procedure and requirements, specifications. The procedures and requirements for the submission and approval of site plans shall be specified in the zoning ordinance. Site plan submission, review, and approval shall be required for special land uses and planned unit developments. Decisions rejecting, approving, or conditionally approving a site plan shall be based upon standards and requirements contained in the zoning ordinance.

(5) Approval, conditions. A site plan shall be approved if it contains the information required by the zoning ordinance and is in compliance with the zoning ordinance and the conditions imposed thereunder, other applicable ordinances, and state and federal statutes. [Emphasis added.]

The city argues that, because it agreed with Quality to make changes that affected Bennigan's site plan, the statute was not violated. They argue that Quality was the *landowner* under the plain language of the statute, and that no judicial construction is appropriate when determining if the statute was violated. If statutory language is unambiguous, it is generally presumed that the Legislature intended the plainly expressed meaning, and the court must enforce the statute as written. *Stanton v Battle Creek*, 466 Mich 611, 615; 647 NW2d 508 (2002); *American Federation of State, County and Municipal Employees v Detroit*, 252 Mich App 293, 305; 652 NW2d 240 (2002). "[W]hen the Legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself and there is no need for judicial construction." *Id.* Statutory terms that are not otherwise defined by the statute must be given their plain and ordinary meanings. *Cox v Bd of Hospital Managers for the City of Flint*, 467 Mich 1, 18; 651 NW2d 356 (2002). Resort to dictionary definitions as an interpretive aid is appropriate. *Id.* In this case, the statute clearly uses the term "landowner" as the entity that must agree to site plan changes after the site plan is approved. *Random House Webster's College Dictionary* (1997) defines landowner as "an owner or proprietor of land." "Proprietor" is defined as "a person who has exclusive right or title to something; an owner, as of real property." Under the prevailing view of statutory interpretation, the term "landowner" must be given a plain meaning under MCR 125.584d. Under such circumstances, there is no question of material fact with respect to whether the city violated the statute when it sought agreement from Quality, which agreement implicitly changed Bennigan's approved site plan. Therefore, the city was entitled to summary disposition on any claim premised on a violation of MCL 125.584d. This Court generally leaves it to the Legislature to enact any changes to effect an intent contrary to that expressed by the plain language of a statute. See *Cherry Growers, Inc v Agricultural Marketing and Bargaining Bd*, 240 Mich App 153, 173; 610 NW2d 613 (2000).

In addition to the claimed statutory violation, Bennigan's also argues, in the alternative, that the two access points for Hooters and the placement of the cooler pad on its premises constitute regulatory takings by the city.

With respect to the cross-access requirement, the trial court failed to recognize questions of fact with respect to the two cross-access designations on Bennigan's property. If both of the access openings were required by ordinance, no taking occurred. Bennigan's lease was entered into subject to ordinance requirements. Further, a lessor cannot transfer greater rights than he possesses. *Id.* Both Bennigan's and Quality recognized this when they agreed on the lease, which subjected Bennigan's interests to the ordinances. Bennigan's had no right to prevent the imposition of cross-access regulations because Quality never had an absolute right to deny cross access on the property that was zoned as commercial planned development property. *Id.* at 24-25. Because there are questions of fact related to the two access points, the trial court's grant of summary disposition to the city was improper.

With respect to the encroaching cooler pad, there was no question of material fact even though Bennigan's had an exclusive right to the leased premises and even though private property may not be taken for a private purpose. *Shizas v Detroit*, 333 Mich 44, 50; 52 NW2d 589 (1952). Clearly, there was no categorical taking because Bennigan's was not denied all economically beneficial use of its property. *Adams, supra*, 463 Mich 23-24. The traditional balancing test to determine a regulatory taking was therefore implicated. Three factors must be balanced. *Id.* First, the nature of the government's action is reviewed. *Id.* In this case, the city approved Hooters' site plan. It did not, however, apply any regulation to require the cooler pad to be on property that was leased to Bennigan's. The purpose of the site plan, as acknowledged by Bennigan's, is to insure that a proposed land use complies with all local ordinances and state and federal statutes. MCL 125.584d(1). The purpose of approval is not to determine any private property dispute. Thus, unlike the situation with cross access, there was no regulatory action that required Bennigan's to give a portion of its property to Hooters to construct a cooler pad. The second inquiry requires exploration of the economic effect of the regulation on the property. *Id.* As previously noted, there was no regulation of the property. The third factor requires consideration of the extent by which the regulation has interfered with distinct, investment-backed expectations. *Id.* Again, there was no regulation by the city with respect to the cooler pad. In sum, with respect to the cooler pad, there was no regulatory taking by the city that requires relief for Bennigan's. Summary disposition on this aspect of Bennigan's claim against the city was appropriate.

Docket No. 238885

VIII

Bennigan's argues that the trial court erred by permitting Quality to seek contract damages without pleading those damages. Whether Quality's motion for costs and attorney fees was sufficient to enable recovery of costs and attorney fees under the contractual provisions presented a question of law that is reviewed de novo. *In re Estate of Shields*, 254 Mich App 367, 368; 656 NW2d 853 (2002).

Although ¶ 15.4 of the lease contract provides that the prevailing party in the suit is entitled to costs, expenses, and a reasonable attorney fee, Quality never pleaded any of these costs pursuant to the contract. Rather, in its brief in support of its motion for summary disposition, Quality requested costs and attorney fees under ¶ 15.4. Whether attorney fees and costs must be pleaded when they are available pursuant to a contractual term has not been squarely decided.

In *Central Transport, Inc v Fruehorf Corp*, 139 Mich App 536, 548; 362 NW2d 823 (1984), this Court ruled that “[a]ttorney fees awarded under contractual provisions are considered damages, not costs.” It is axiomatic that special damages must be pleaded. MCR 2.112(I). Special damages, as encompassed by MCR 2.112(I), are not clearly defined in the law. 2 Dean & Longhofer, Michigan Courts Rules Practice (4th ed) provides:

Subrule (I) states only that items of special damages must be pleaded; it does not define special damages. Special damages are those damages that are the natural but not the necessary consequence of the defendant’s conduct (in contrast to general damages, which are the damages proximately resulting from the defendant’s conduct). That is special damages are those which are unusual given the type of claim, and thus might surprise the opponent if not specifically pleaded. *A clear example is a claim for attorney fees.* A claim for exemplary damages is another example. Obviously the line between special and general damages is not always clear, and prudence dictates pleading such items of damages when in doubt. [Emphasis added.]

In general, attorney fees are not recoverable unless specifically authorized by court rule, statute or another exception. *Burnside v State Farm Mutual Fire & Casualty Co*, 208 Mich App 422, 430-431; 528 NW2d 749 (1995). In contract cases, damages are not designed to punish the wrongdoer, *id.* at 430, and there is no court rule or statute that permits attorney fees as part of the general damages available for a breach of contract. Thus, attorney fees are not generally recoverable in contract cases. An exception exists where the parties have contracted for payment of such fees to the prevailing party. *Fruehauf, supra* at 536. The unambiguous language of the lease permitted Quality to obtain reasonable attorney fees if Quality was the prevailing party. The damages, however, fit within the category of special damages because they are not a usual consequence of a claim for breach of contract. Because Quality did not plead special damages, however, the merits of a claim of entitlement to those damages need not be considered. *Isagholian v Transamerica Ins Corp*, 208 Mich App 9, 17-18; 527 NW2d 13 (1994); see also *Law Offices of Lawrence J Stockler v Rose*, 174 Mich App 14, 45; 436 NW2d 70 (1989). Thus, we conclude that it was error for the trial court to award the specific contract damages because the damages were not properly pleaded.⁴

⁴ Additionally, failure to plead damages that are later sought generally precludes the damages. See, e.g., *Theisen v Knake*, 236 Mich App 249, 259-260; 599 NW2d 777 (1999). In light of our conclusion that Quality did not properly plead contract damages, we need not address Bennigan’s arguments that the trial court erred in finding that Quality prevailed for purposes of damages under ¶ 15.4, or that Bennigan’s was entitled to a jury trial on the issue of the reasonableness of the attorney fees.

In Docket No. 236800, we affirm in part and reverse in part. In Docket No. 238885, we reverse.

/s/ Jessica R. Cooper
/s/ E. Thomas Fitzgerald
/s/ Kirsten Frank Kelly