

STATE OF MICHIGAN
COURT OF APPEALS

LATIA HUDSON,

Plaintiff-Appellant,

v

CALVARY CHURCH OF JESUS CHRIST,

Defendant,

and

PILGRIM COMMUNITY MISSIONARY
BAPTIST CHURCH,

Defendant-Appellee.

UNPUBLISHED

May 12, 2005

No. 253077

Wayne Circuit Court

LC No. 02-205216-NO

Before: O’Connell, P.J., and Markey and Talbot, JJ.

PER CURIAM.

Plaintiff appeals by right from a default judgment entered against defendant, Calvary Church of Jesus Christ (Calvary), in this premises liability case. The issues on appeal, however, are related to an earlier order granting summary disposition in favor of defendant, Pilgrim Community Missionary Baptist Church (Pilgrim), and against plaintiff pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff first argues that the trial court erred in granting Pilgrim summary disposition based on its determination that the rental agreement (the Agreement) between Pilgrim and Calvary is a lease. Specifically, plaintiff argues that Pilgrim, as the owner of the premises, is not immune from premises liability because the Agreement is a license, not a lease because it does not have a termination date. We disagree.

A trial court’s decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party to determine whether the movant is entitled to judgment as a matter of law. *Id.*; *Morales v Auto-*

Owners Ins, 458 Mich 288, 294; 582 NW2d 776 (1998). Our review is limited solely to the evidence that had been presented to the trial at the time the motion was decided. *Peña v Ingham County Road Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003). The proper interpretation of a contract is also a question of law that this Court reviews de novo. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003).

A license gives permission to do some act or series of acts on the land of the licensor without giving any permanent interest in the land. *Macke Laundry Service Co v Overgaard*, 173 Mich App 250, 254; 433 NW2d 813 (1988). A lease, on the other hand, gives the tenant possession of the pertinent property and its exclusive use or occupation for all purposes not prohibited by the terms of the lease. *Id.* at 253. To be a valid lease, the contract must contain the names of the parties, an adequate description of the leased premises, the length of the lease term and the amount of rent. *Id.* at 254.

Contrary to plaintiff's argument, a valid lease does not require a termination date; it only needs to contain an adequate description of the length of the lease term. *Id.* We agree with the trial court's determination that the month-to-month tenancy identified in the Agreement is a sufficient description of the length of the lease term. Michigan law has long recognized that a leasehold interest can be based on a month-to-month tenancy without a fixed termination date. *Frenchtown Villa v Meadors*, 117 Mich App 683, 688-689; 324 NW2d 133 (1982). In addition, the Agreement specifically identifies the parties bound by it, the legal description of the property, and the amount of rent to be paid. Because all of the requirements for a valid lease are met, the trial correctly found that the lease existed between Pilgrim and Calvary. *Macke, supra* at 254.

Next, plaintiff argues that the trial court erred in granting Pilgrim summary disposition because there is a question of fact that Pilgrim retained sufficient possession and control of the premises in question. We disagree.

It is well established that "premises liability is conditioned upon the presence of both possession and control over the land." *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 660; 575 NW2d 745 (1998). Liability depends upon actual possession of and control over the premises. *Id.* at 661. For purposes of premises liability, whether possession exists depends on the actual exercise of dominion and control over the property. *Id.*

Pilgrim was the owner of the premises, but "[o]wnership alone is not dispositive." *Merritt v Nickelson*, 407 Mich 544, 552; 287 NW2d 178 (1980). "Possession and control are certainly incidents of title ownership, but these possessory rights can be loaned to another, thereby conferring the duty to make the premises safe while simultaneously absolving oneself of responsibility." *Id.* at 552-553.

We conclude that Calvary had both possession and control of the premises. In pertinent part, the provisions of the Agreement provide as follows.

1. **Ordinances and Statutes.** Lessee shall comply with all statutes, ordinances and requirements of all municipal, state and federal authorities now in force, or which may hereafter be in force, pertaining to the use of the premises.

2. **Repairs or Alterations.** Lessee shall be responsible for damages caused by its negligence and that of his congregation or invitees and guests. All alterations, additions, or improvements made to the premises shall become the property of Lessor and shall remain upon and be surrendered with the premises.
3. **Upkeep of Premises.** Lessee shall keep and maintain the premises in a clean and sanitary condition at all times, and upon the termination of the tenancy shall surrender the premises to Lessor in as good condition as when received, ordinary wear and damage by the elements excepted.

Generally, contractual language is interpreted according to its plain meaning. *Schroeder v Terra Energy, Ltd*, 223 Mich App 176, 182; 565 NW2d 887 (1997). A contract should be read as a whole, with meaning given to all of its terms. *Century Surety Co v Charron*, 230 Mich App 79, 82; 583 NW2d 486 (1998). Courts are not to create ambiguity where none exists. *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998).

Plaintiff argues that the provisions of the Agreement should be interpreted as Pilgrim's retaining both the responsibility to make all repairs necessitated by either normal wear and tear or for reason uncaused by Calvary's negligence. But, as the trial court found, plaintiff's argument is premised on several inferences stemming from on what the Agreement fails to state. Contrary to plaintiff's argument, we find that the challenged provisions of the Agreement clearly express that Calvary is responsible for all repairs, alterations, and upkeep of the premises for the duration of the lease. Also, we find that the Agreement clearly provides that upon surrender plaintiff must return the premises in as good condition as when received except for ordinary wear and tear. This does not create a question of fact regarding whether Pilgrim has a duty to maintain the premises for ordinary wear and tear. Reading the contract as a whole, one must conclude that no question of fact exists regarding the meaning of these provisions. Accordingly, we conclude the trial court properly ruled that the Agreement did not impose on Pilgrim any duty to maintain and repair the premises. *Century Surety Co, supra* at 82.

Furthermore, we hold that plaintiff failed to present sufficient evidence of Pilgrim's possession and control over the premises to survive summary disposition. It is undisputed that since July 1, 1990, Calvary had continuously and exclusively occupied and maintained the premises. Felicia Johnson, the Secretary for Calvary, testified that, in 1991, the members of Calvary renovated certain areas, which included replacing the carpet in the sanctuary with tile. Felicia also testified that some time after 1990, but before 1995, some unidentified members of Calvary placed the duct tape on the carpeting on the stairs. Moreover, it is undisputed that Pilgrim had not inspected the premises after parties entered into the Agreement, nor did Pilgrim have any knowledge of any defects on the premises before the incident.

Plaintiff still maintains that the affidavit of Mary Johnson, a member of Calvary, at least created a question of fact that Pilgrim exercised some control over the carpet on the stairs where the injury occurred. We disagree. Mary Johnson's affidavit regarding the alleged decision made by either "the landlord" or an unidentified person in Pilgrim was inadmissible hearsay, and therefore, not enough to defeat a motion for summary disposition. *Skinner v Square D Co*, 445 Mich 153, 160-61, 516 NW2d 475 (1994); *SSC Associates v General Retirement System of Detroit*, 192 Mich App 360, 363-65; 480 NW2d 275 (1991) ("opinions, conclusory denials, unsworn averments, and inadmissible hearsay do not satisfy the court rule [MCR 2.116(C)(10)];

disputed fact (or the lack of it) must be established by admissible evidence”). Moreover, even if Johnson’s affidavit pertained to an isolated incident and indicated no time frame. Thus, Mary’s affidavit does not raise a question of fact concerning whether Pilgrim possessed and controlled the premises at the time of plaintiff’s fall in 2000. As such, the trial court properly dismissed plaintiff’s premises liability claim against Pilgrim because it owed no duty to plaintiff to repair or maintain the premises or specifically the carpet in question.

Next, plaintiff argues that the trial court erred in granting Pilgrim’s motion for summary disposition regarding plaintiff’s nuisance claim. Specifically, plaintiff argues that the trial court erred in finding as a matter of law, the dangerous condition that caused the accident did not exist at the time of transfer. We disagree.

An injured party may bring a nuisance cause of action against a landlord even though the landlord had relinquished complete control, possession and use of the premises where, at the time the premises are transferred, a hidden danger exists and the landlord knew or should have known of the danger and failed to apprise the tenant of it. *McCurtis v Detroit Hilton*, 68 Mich App 253, 256; 242 NW2d 541 (1976). In the instant case, the undisputed evidence shows that the condition was not a hidden danger and was not the same at the time of the incident as it was when the premises were transferred to Calvary. Regardless of whether the carpet on the stairs or the duct tape placed on the carpet created the dangerous condition, we hold that there is no question of fact that the condition that caused plaintiff’s fall in 2000 was different from the condition at the time of transfer in 1990. The carpet on the stairs had “obviously” worsened from 1990 to 1995, and some time after the transfer of the premises, members of Calvary placed the duct tape on the carpet on the stairs. As plaintiff did not present sufficient evidence to create a factual question whether the nuisance existed at the time of transfer, we hold that plaintiff’s nuisance claim would have been futile, and that the trial court did not err in dismissing her nuisance claim as a matter of law. *McCurtis, supra* at 256.

Finally, plaintiff challenges the trial court’s grant of case evaluation sanctions and the amount of sanctions. We review de novo a trial court’s decision to grant or deny a motion for case evaluation sanctions. *Elia v Hazen*, 242 Mich App 374, 377; 619 NW2d 1 (2000). A trial court’s decision regarding the amount of an award of such sanctions is reviewed for an abuse of discretion. *Id.*

Specifically, plaintiff argues that the grant of sanctions under MCR 2.403(O)(2)(c) was improper because there was no “motion after rejection of the case evaluation.” We disagree. The plain language of MCR 2.403(O)(1) requires the trial court to award the opposing party’s actual costs if the verdict itself, adjusted only as set forth in MCR 2.403(O)(3), is not more favorable to the rejecting party than the case evaluation. For purposes of MCR 2.403(O), a “verdict” includes “a judgment entered as a result of a ruling on a motion after rejection of the case evaluation.” MCR 2.403(O)(2)(c). As MCR 2.403(O)(2)(c) requires a “ruling on a motion after rejection of the case evaluation,” plaintiff’s argument that it requires a “motion after rejection of the case of the case evaluation” to invoke sanctions is wrong and misleading. Here, the “verdict” or a ruling on Pilgrim’s and plaintiff’s motions was entered as required by MCR 2.403(O)(2)(c) after case evaluation was rejected. Moreover, there is no contention that the verdict was more favorable to plaintiff than the case evaluation, nor is there any argument to that effect. Thus, we conclude that the trial court properly awarded case evaluation sanctions in favor of Pilgrim.

Also, we reject plaintiff's argument that the amount of award was improper. A party who rejects an evaluation and fails to improve his position at trial must pay the opposing party's "actual costs," which include reasonable trial attorney fees. MCR 2.403(O)(1), (6); *Haliw v City of Sterling Heights*, 471 Mich 700, 702; 691 NW2d 753 (2005). The trial judge must determine a reasonable attorney fee based on a reasonable hourly or daily rate for services necessitated by the rejection of the evaluation. MCR 2.403(O)(6)(b). Attorney fees are "necessitated by the rejection of the case evaluation" if incurred after rejection of the evaluation. *Michigan Basic Property Ins Ass'n v Hackert Furniture Distributing Co*, 194 Mich App 230, 235; 486 NW2d 68 (1992).

In the instant case, the trial court ordered case evaluation sanctions pursuant to MCR 2.403 "for the entries made in defendant's motion from March 10, 2003[,] until September 2, 2003, in the amount of \$1,400." Thus, contrary to plaintiff's argument that the amount of award includes fees and costs incurred before the case evaluation and before the trial court's decision on the motions for summary disposition, it only includes fees and costs incurred after the rejection of the case evaluation. *Michigan Basic Property*, *supra* at 235. Plaintiff does not contest the reasonableness of the award; nor does she contest that a causal nexus exists between the case evaluation rejection and the post-rejection fees. See *Haliw*, *supra* at 711, n 8. As such, we hold that the trial court did not abuse its discretion in determining the amount of the award.

We affirm.

/s/ Peter D. O'Connell

/s/ Jane E. Markey

/s/ Michael J. Talbot