

STATE OF MICHIGAN
COURT OF APPEALS

LAUREL WOODS APARTMENTS,
Plaintiff-Appellant,

v

NAJAH ROUMAYAH and REBECCA
ROUMAYAH,

Defendants-Appellees.

FOR PUBLICATION
March 8, 2007
9:10 a.m.

No. 269506
Oakland Circuit Court
LC No. 05-069007-CZ

Official Reported Version

Before: Wilder, P.J., and Kelly and Borrello, JJ.

KELLY, J.

In this breach of contract claim, plaintiff Laurel Woods Apartments appeals as of right an order granting summary disposition in favor of defendants Najah Roumayah and his niece, Rebecca Roumayah. We reverse and remand.

I. Facts

This case arises from a kitchen fire in an apartment owned and operated by plaintiff and leased by defendants. Defendants signed a lease agreement that, in addition to listing Najah and Rebecca Roumayah "jointly severally" as "Tenant," and defining "Premises" as apartment 208, contained the following provision:

9. Maintenance Repairs and Damage of Premises. Tenant shall keep the Premises and all appliances in good condition and repair, and shall allow no waste of the Premises or any utilities. Tenant shall also be liable for any damage to the Premises or to Landlord's other property (i.e., other units, common facilities and equipment) that is caused by the acts or omissions of Tenant or Tenant's guests. Landlord shall perform all maintenance and repairs to the roof, walls and structural elements, all mechanical, plumbing and electrical systems at Landlord's cost and expense, unless such damage is caused by Tenant[']s acts or neglect, in which case such cost and expense incurred by Landlord shall be paid by Tenant.

After defendants moved into the apartment, a fire occurred in the kitchen that resulted in substantial damage to the premises. The firefighters' investigation revealed that the fire originated on top of the kitchen stove. The inspection report included a statement by Rebecca Roumayah that she was cooking, but thought she had turned off the stove. While she was in the

other room talking on the phone, the kitchen lit up in flames. She attempted to call 911, but did not succeed until she was outside the building.

Plaintiff filed a complaint alleging that defendants caused damage to the premises and, pursuant to paragraph 9 of the lease agreement, are liable for those damages. Plaintiff alleged that defendants failed or refused to perform their contractual obligations and, therefore, breached the lease agreement. Plaintiff subsequently filed a motion for summary disposition pursuant to MCR 2.116(C)(10), arguing that there was no question of fact regarding whether Rebecca Roumayah caused the fire and that, under the lease agreement, defendants were jointly and severally obligated to pay for any damage that they caused to the premises.

Defendants filed a countermotion for summary disposition pursuant to MCR 2.116(C)(8). Defendants first asserted that, in *New Hampshire Ins Group v Labombard*, 155 Mich App 369; 399 NW2d 527 (1986), this Court held that despite a contractual provision that the tenant agreed to "yield up" the premises "in like condition as when taken," there was no express agreement that the tenant would be liable to the landlord for fire damage, and the Court held that, absent such an agreement, the tenant could not be liable for negligently caused fire damage. Defendants contended that in this case, like in *Labombard*, there was no express agreement that they would be liable for fire damage. Defendants cited several portions of the lease agreement that, they argued, indicated that plaintiff carried fire insurance and that defendants were released from liability for any damage covered by such a policy. Defendants also asserted that Najah Roumayah could not be liable because there was no question of fact regarding whether he caused the fire, and joint and several liability was in violation of MCL 600.2956 and public policy. Defendants also asserted that while the evidence demonstrated that a fire caused the damage at issue, it was unclear whether Rebecca Roumayah caused the fire.

Plaintiff filed a reply brief in which it argued that all of defendants' arguments presumed that plaintiff's claim was a negligence claim, but it was solely a breach of contract claim. Accordingly, *Labombard* was inapplicable as was MCL 600.2956, which relates to torts. Plaintiff also asserted that there was "no doubt" that Rebecca Roumayah caused the fire.

At the motion hearing, the trial court asked whether there was any provision in the lease agreement that expressly required the tenant to maintain fire insurance. Plaintiff's counsel answered that there was not. The trial court stated, "Then I'm going to grant [defendants'] motion. I think [*Labombard*] controls." The trial court entered an order denying plaintiff's motion for summary disposition and granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(8).

II. Analysis

Plaintiff first contends that the trial court erred in granting defendants' motion for summary disposition pursuant to *Labombard* when defendants were contractually liable for the damage caused to the premises. We agree.

The trial court granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(8) on the basis that plaintiff failed to state a claim on which relief may be granted. When an action is based on a written contract, it is generally necessary to attach a copy of the

contract to the complaint. MCR 2.113(F). Accordingly, the written contract becomes part of the pleadings themselves, even for purposes of review under MCR 2.116(C)(8). *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 133; 676 NW2d 633 (2003). We review de novo a trial court's decision to grant or deny summary disposition pursuant to MCR 2.116(C)(8). *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). "A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the complaint and allows consideration of only the pleadings. The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery." *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001) (citation omitted).

A. Liability for Damage Caused by Tenants

The first question is whether defendants are *contractually* liable for the damage to the premises allegedly caused by Rebecca Roumayah.

The lease agreement designates the Roumayahs as "Tenant" and unit #208 as "Premises." It is undisputed that both parties signed the agreement. It provides:

9. Maintenance Repairs and Damage of Premises. Tenant shall keep the Premises and all appliances in good condition and repair, and shall allow no waste of the Premises or any utilities. *Tenant shall also be liable for any damage to the Premises or to Landlord's other property (i.e., other units, common facilities and equipment) that is caused by the acts or omissions of Tenant or Tenant's guests.* Landlord shall perform all maintenance and repairs to the roof, walls and structural elements, all mechanical, plumbing and electrical systems at Landlord's cost and expense, unless such damage is caused by Tenant[']s acts or neglect, in which case such cost and expense incurred by Landlord shall be paid by Tenant. [Emphasis added.]

Plaintiff asserts that the emphasized portion of this paragraph unambiguously provides that defendants are liable for damage Rebecca Roumayah caused to the premises. Defendants, to the contrary, claim that pursuant to *Labombard*, plaintiff cannot recover fire repair costs from defendants because the lease agreement did not contain an express agreement that they would be liable for negligently causing fire damage and because the lease agreement did not require defendants to insure the premises.

In *Labombard*, the building owner purchased insurance from the insurance company and, accordingly, the insurance company paid for damages arising from a fire caused by a tenant. *Labombard, supra* at 370. The insurance company and building owner sued the tenant in tort, claiming that she was negligent in causing a fire on the premises. *Id.* at 371. The defendant filed a motion pursuant to MCR 2.116(C)(8) asserting that the contract "absolved her of liability for fire damages to the rental premises." *Id.* She also argued that, as a matter of law, a tenant is not liable for fire damage caused by his or her own negligence. *Id.* The *Labombard* Court first examined whether there was an express agreement that the defendant would be liable for fire damage resulting from the defendant's negligence. *Id.* at 373-374. Having found none, *id.* at 374, it reviewed the remainder of the contract in an attempt to discern what the parties had

contemplated. The Court concluded that the "agreement clearly evidences the parties' mutual expectation that fire insurance would be obtained by the lessor." *Id.* at 376. Reading the contract as a whole, this Court concluded, "Nothing in the rental agreement suggests, however, that defendant agreed to be liable to the lessor, or his insurer, for the full amount of negligently caused fire damage." *Id.* Accordingly, this Court held that, "absent an express and unequivocal agreement by a tenant to be liable to the lessor or the lessor's fire insurer *in tort* for negligently caused fire damage to the premises, the tenant has not duty to the lessor or insurer which would support a *negligence* claim for such damages." (Emphasis added.)

Labombard does not apply to this case. *Labombard* was a negligence action, whereas this is a breach of contract action. The holding in *Labombard* makes plain that the Court was limiting negligence claims against tenants for fire damage to circumstances in which there is an express agreement allowing such liability. Thus, although the *Labombard* Court considered the parties' lease agreement, the holding in *Labombard* has no applicability here.

Rather, in deciding this breach of contract action, we follow the well-established rules of contract construction. Where the language of a contract is clear and unambiguous, construction of the contract is a question of law. *Meagher v Wayne State Univ*, 222 Mich App 700, 721; 565 NW2d 401 (1997). A contract is not ambiguous if it fairly admits of but one interpretation. *Id.* at 722. A court must "give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory." *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003). However, if provisions of a contract irreconcilably conflict, the contractual language is ambiguous, and the ambiguous contractual language presents a question of fact to be decided by a jury. *Id.* at 467, 469.

The lease agreement in this case is clear and unambiguous. It states, "Tenant shall also be liable for any damage to the Premises . . . that is caused by the acts or omissions of Tenant or Tenant's guests." Accordingly, defendants, who are defined as "Tenant," are liable for "any damage" caused by their act or omission. Fire damage is clearly encompassed by the broad term "any damage." And defendants' liability is not limited to damage caused by their negligence, but rather, it extends to any damage that they cause, negligently or otherwise.

Defendants contend that, despite paragraph 9, paragraphs 13, 16, and 17¹ suggest that the parties agreed that plaintiff would insure the premises. These paragraphs provide, in relevant

¹ 13. Access to the Premises. Tenant shall allow Landlord and Landlord's agents reasonable access to the Premises to inspect, repair, alter, or improve the Premises upon 24 hours prior notice. Tenant shall also allow insurance carriers and representatives, fire department inspectors, police, or local health authorities to inspect the Premises to the extent permitted by law upon 24 hours prior notice.

* * *

16. Property Loss or Damage, And Insurance. To the extent permitted by law, Landlord and Landlord's agents shall not be liable for any damage to or loss of
(continued...)

part, that defendant will allow insurance carriers to inspect the premises, that plaintiff and defendants "agree to release each other from any liability for loss, damage, or injury for which insurance is carried to the extent of any recovery under an insurance policy," and upon casualty, plaintiff's obligation to repair the premises "shall be limited to the amount of insurance proceeds actually received by [plaintiff]." However, in none of these provisions does plaintiff agree to insure the premises. Rather, these provisions are applicable *if* the premises are insured by either party. Nor does paragraph 9 irreconcilably conflict with paragraphs 13, 16, and 17. Rather, the parties agreed that defendants would be liable for any damage they caused to the premises and, if the premises were insured, both parties would be released from liability to the extent of any recovery under an insurance policy. To read the contract as defendants suggest would render paragraph 9 nugatory, which, considering that the provisions do not irreconcilably conflict, is impermissible. *Klapp, supra* at 467-469. Because the parties agreed that defendants would be liable for any damage they caused to the premises, the trial court erred in granting defendant's motion for summary disposition on the basis of *Labombard*.

B. Joint and Several Liability

(...continued)

Tenant's property that is caused by theft, fire, pipe bursts, flood, or other casualty on the Premises, carport, or storage room. Landlord recommends that Tenant obtain renter's insurance to protect Tenant's personal property against such loss or damage. . . . Landlord and Tenant agree to release each other from any liability for loss, damage or injury for which insurance is carried to the extent of any recovery under an insurance policy.

* * *

17. Damages or Destruction of Premises. If casualty partially destroys the Premises but it can be restored to a tenable condition prior to the expiration of the Lease Term, Landlord has the option to repair the Premises with reasonable dispatch; however, Landlord's obligation to repair the Premises shall be limited to the amount of insurance proceeds actually received by Landlord. Tenant's obligation to pay rent may be equitably abated during the period of restoration to the extent Tenant vacates the Premises (or portion thereof) and removes any personal property that would otherwise obstruct Landlord's access or delay the repairs to the damaged areas. If a casualty damages the Premises to the extent that it is reasonably anticipated that Tenant must totally vacate the Premises for a period in excess of two (2) weeks during which repairs would otherwise be made or if Landlord is unable or unwilling to repair the Premises, then Landlord may terminate this Lease by giving Tenant written notice within five (5) days after the casualty. Landlord shall not be liable for any reasonable delay or for providing housing for Tenant during repairs. Tenant shall not be responsible for any portion of fire or extended coverage insurance that Landlord may elect to maintain on the premises.

Plaintiff also contends that defendants are jointly and severally liable for the alleged damages pursuant to the contract. This issue is not properly preserved for appellate review because the trial court did not address it. *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98; 494 NW2d 791 (1992). However, "this Court may overlook preservation requirements if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented." *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006). We address this issue because it involves a question of law and the lower court record contains sufficient facts to resolve the issue.

Najah Roumayah contends that the trial court should have dismissed the claim against him because (1) pursuant to MCL 600.2956, he cannot be held jointly and severally liable and (2) there is no evidence that he caused the fire.

MCL 600.2956 provides:

Except as provided in section 6304, in an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each defendant for damages is several only and is not joint. However, this section does not abolish an employer's vicarious liability for an act or omission of the employer's employee.

Our Supreme Court noted in *Gerling Konzern Allgemeine Versicherungs AG v Lawson*, 472 Mich 44, 51; 693 NW2d 149 (2005), that the tort-reform legislation

eliminated joint and several liability in certain tort actions, requir[ing] that the fact-finder in such actions allocate fault among all responsible tortfeasors, and provid[ing] that each tortfeasor need not pay damages in an amount greater than his allocated percentage of fault. As such, in an action in which an injured party has sued only one of multiple tortfeasors and in which [MCL 600.2956, 600.2957, and 600.6304] apply, the tortfeasor would have no need to seek contribution from other tortfeasors, either in that same action (by bringing in third-party defendants) or in a separate action, because no "person shall . . . be required to pay damages in an amount greater than his or her percentage of [allocated] fault" [Citations omitted.]

However, this case does not sound in tort. It is strictly a breach of contract claim, and the contract provides:

THIS APARTMENT LEASE AGREEMENT ("Lease") is made and entered into this date of June 1, 2005 between LAUREL WOODS APARTMENTS L.L.C[.]; with an address of 22200 Laurel Woods Drive, Southfield, Michigan 48034 ("Landlord") (jointly severally) Najah Roumayah & Rebecca Roumayah ("Tenant").

It is undisputed that Najah and Rebecca Roumayah signed the lease agreement. Thus, according to its plain terms, the parties agreed that Najah and Rebecca Roumayah were jointly and severally liable.

By its plain terms, MCL 600.2956 does not preclude this agreement; it applies to tort actions "or another legal theory seeking damages for personal injury, property damage, or wrongful death." While this breach of contract claim clearly seeks to recover for damage to plaintiff's property, the damages sought are pursuant to contract and therefore are contract damages that arise incidentally from property damage. MCL 600.2956 does not provide that it applies to a legal theory seeking contract damages. Nor is there any indication that the Legislature, by amending MCL 600.2956, sought to limit or eliminate the parties' freedom to contract. The parties agreed that defendants would be jointly and severally liable for any damage that either of them caused. This agreement is not precluded by MCL 600.2956.

While we agree that there is no evidence that Najah Roumayah caused the fire, this does not preclude his contractual liability. As mentioned above, the contract named Najah and Rebecca Roumayah "jointly severally" as "Tenant." The contract further provided that "Tenant shall also be liable for any damage to the Premises . . . that is caused by the acts or omissions of Tenant or Tenant's guests." Accordingly, Najah Roumayah is liable for any damage caused to the premises by himself, Rebecca Roumayah, or any other guest.

C. Conclusion

The trial court erred in granting summary disposition in defendants' favor when the contract plainly and unambiguously provided that both defendants were jointly and severally liable for damage that either one of them caused to the premises. The trial court should have granted partial summary disposition in plaintiff's favor on this issue. The question remains, however, whether there is a question of fact regarding whether Rebecca Roumayah caused the alleged damage. Plaintiff raised this issue in its motion for summary disposition, but the trial court never addressed it, having granted defendants' motion on other grounds instead.

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

Wilder, P.J., concurred.

/s/ Kurtis T. Wilder

/s/ Kirsten Frank Kelly