

STATE OF MICHIGAN
COURT OF APPEALS

ALLOS MARKET, INC.,

Plaintiff-Appellant,

v

HILANTO, INC.,

Defendant-Appellee.

UNPUBLISHED

September 24, 2009

No. 285261

Wayne Circuit Court

LC No. 06-634980-CK

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

PER CURIAM.

Plaintiff appeals as of right from the trial court’s order granting summary disposition to defendant, finding that defendant was not obligated to pay for the new roof on a building for which a draft deed had been delivered into escrow. We reverse and remand for further proceedings consistent with this opinion.

The parties were previously before this Court in *Allos Market, Inc v Hilanto, Inc*, unpublished opinion per curiam of the Court of Appeals, issued February 8, 2007 (Docket No. 272112). In that earlier appeal, this Court upheld the enforceability of an option to purchase certain real estate that was included in a contract for business assets, despite the fact that the option was not subsequently provided for in a lease of the premises. This Court held that the lease was not a complete expression of the parties’ agreement and that it did not extinguish the option to purchase.

While the earlier appeal was pending, defendant executed a warranty deed that was placed in escrow pending the payment of \$140,000 for the real estate. Plaintiff had been making payments to the circuit court clerk during the lower court proceedings and continued the payments during the pendency of that appeal. It is not clear from the record whether these payments were intended as rent or payments pursuant to the option.¹ Also, while the prior appeal

¹ From the existing record we are unable to determine if these payments were rent payments or if they were payments toward the purchase price of the property. If they were rent payments, then it may be assumed that the initial agreement was still in place. If the payments were pursuant to the purchase price, then plaintiff may have acquired an equitable interest in the property, similar
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was pending, plaintiff filed the present lawsuit, alleging that problems developed with the roof and that, pursuant to the lease, defendant was obligated to repair after receiving written notice. Defendant acknowledged that it was made aware of the problem and was presented with an estimate for repairs, but asserted that the estimate was too high. Defendant attempted to repair the roof with its own contractor but claimed that plaintiff thwarted the effort. The record indicates that, at the time, plaintiff was taking the position that payment for the repairs could come out of the monies it had paid in escrow.

After this Court issued its opinion in the prior appeal, defendant delivered a deed to plaintiff. Thereafter, the Wayne County Treasurer issued defendant a check for \$140,000. Plaintiff then moved for summary disposition, asserting that defendant was still responsible for the cost of repairing the roof. The trial court held that the real estate transferred when it issued its initial order upholding the purchase option and that the defendant had no duty to repair the roof.

Whether summary disposition was properly granted is a question of law that is reviewed de novo. *Vega v Lakeland Hospital*, 479 Mich 243, 245; 736 NW2d 561 (2007). The trial court did not indicate that the motion was being decided pursuant to MCR 2.116(C)(10), but it relied on matters outside the pleadings. Thus, we will treat it as a (C)(10) ruling. When considering a motion for summary disposition under MCR 2.116(C)(10), the Court must review the evidence “submitted by the parties in the light most favorable to the nonmoving party.” *Brown v Brown*, 478 Mich 545, 551-552; 739 NW2d 313 (2007). “Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law.” *Id.* at 552.

Preliminarily, defendant argues that plaintiff did not provide a written demand for repairs as required by the lease. Plaintiff counters that an email constituted a written demand. However, while the email implies that a demand was previously made, no demand is made in the email. Nonetheless, as indicated in *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 373-374; 666 NW2d 251(2003), a defendant can be deemed to have voluntarily and intentionally abandoned the right to written notice if there is clear and convincing evidence of affirmative conduct showing mutual assent to waiver of the contract term. Here, defendant’s original position was simply that plaintiff would not allow defendant on the premises, not that plaintiff was responsible for the repairs. Thus, at a minimum, questions of fact arise regarding whether plaintiff provided a written demand for repairs or if defendant waived this contract term.

Defendant also argues that plaintiff waived its right to demand payment for the repairs once it accepted the deed to the property. Defendant provides no authority for this proposition. “A party may not merely announce a position and leave it to the Court of Appeals to discover and rationalize the basis for the claim.” *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 178; 568 NW2d 365 (1997). Regardless, we have found no authority for the proposition that a vested contract right is extinguished under these circumstances.

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to a land contract purchaser.

Plaintiff argues that the trial court erred in holding that the real estate “transferred” when it issued its initial order. We agree. In *Eltel Assocs, LLC v City of Pontiac*, 278 Mich App 588, 590; 752 NW2d 492 (2008), the Court held that where deeds were placed in escrow pending satisfaction of conditions precedent, title did not transfer until the conditions were met. Thus, title transferred to plaintiff when the deed was released from escrow after payment. We note that in *In re Smith Trust*, 480 Mich 19, 25; 745 NW2d 754 (2008), quoting 17 CJS, Contracts, § 55, p 502, the Court stated:

An option contract is an enforceable promise not to revoke an offer. It is a continuing offer or agreement to keep an offer open and irrevocable for a specified period. It is a contract right, and the optionor must keep the offer open. Until an option is exercised, the optionor has the duty not to revoke the offer during the life of the option.

Once the option was exercised, the offer was accepted. Thus, in upholding the exercise of this option, the court’s order validated a contract to purchase; it did not transfer the property to plaintiff.

Eltel Assocs, LLC, supra, makes no distinction between legal and equitable title. The trial court’s determination that title passed when it issued its decision may have been based on an impression that equitable title passed and that the rental agreement had terminated. Like a land contract vendee, plaintiff had a right to the transfer of title once it tendered the money owing. Like a contract vendor, defendant’s interest in the property became the right to secure plaintiff’s debt of \$140,000.

A question therefore arises as to whether plaintiff was a lessee of the property or whether plaintiff had an equitable interest in the property, or both. This question would never arise in a typical land contract situation, as the contract itself would characterize itself as a land contract. We do not have the contract for business assets before us and therefore cannot decide this question. The lease does not speak to the issue. We note, however, that if the contract is silent, “silence does not equal ambiguity if the law provides a rule to be applied in the absence of a provision to the contrary.” *Norman v Norman*, 201 Mich App 182, 184; 506 NW2d 254 (1993). We have found no rule that would preclude parties from having a lease govern the terms of the parties’ dealings during a period where the lessee also has an equitable interest in the property. Thus, we conclude that the contract is ambiguous on this point. In *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 469-470; 663 NW2d 447 (2003), the Court stated:

It is well settled that the meaning of an ambiguous contract is a question of fact that must be decided by the jury. *Hewett Grocery Co v Biddle Purchasing Co*, 289 Mich 225, 236; 286 NW 221 (1939). “Where a contract is to be construed by its terms alone, it is the duty of the court to interpret it; but where its 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, under proper instructions.” *O’Connor v March Automatic Irrigation Co*, 242 Mich 204, 210; 218 NW 784 (1928) (citation omitted).

Where a written contract is ambiguous, a factual question is presented as to the meaning of its provisions, requiring a factual determination as to the

intent of the parties in entering the contract. Thus, the fact finder must interpret the contract's terms, in light of the apparent purpose of the contract as a whole, the rules of contract construction, and extrinsic evidence of intent and meaning. [11 Williston, Contracts (4th ed), § 30:7, pp 87-91.]

In resolving such a question of fact, i.e., the interpretation of a contract whose language is ambiguous, the jury is to consider relevant extrinsic evidence. As this Court explained in *Penzien v Dielectric Products Engineering Co, Inc*, 374 Mich 444, 449; 132 NW2d 130 (1965):

“If the contract in question were ambiguous or ‘doubtful,’ extrinsic evidence, particularly evidence which would indicate the contemporaneous understanding of the parties, would be admissible as an aid in construction of the disputed terms.”

“The law is clear that where the language of the contract is ambiguous, the court can look to such extrinsic evidence as the parties’ conduct, the statements of its representatives, and past practice to aid in interpretation.”
[Citations omitted.]

Here, the parties’ statements and positions, defendant’s initial efforts to make the repairs, the indication that plaintiff’s attorney may have thought the money for repairs would come from the escrow account, as well as other potential factors, would all have bearing on the parties’ intent regarding responsibility for repairs before legal title passed to plaintiff. Thus, presuming the contract was silent, this would be a question for the jury.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O’Connell
/s/ Michael J. Talbot
/s/ Cynthia Diane Stephens