

STATE OF MICHIGAN
COURT OF APPEALS

HORIZON PROPERTIES, L.L.C., d/b/a
HORIZON PROPERTIES VENTURE, L.L.C.,

UNPUBLISHED
September 18, 2008

Plaintiff/Counter-Defendant-
Appellant,

v

DOWNRIVER COMMUNITY CONFERENCE,

Defendant/Counter-Plaintiff-
Appellee.

No. 278260
Wayne Circuit Court
LC No. 05-531702-CK

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

PER CURIAM.

Plaintiff appeals as of right the trial court's grant of summary disposition in favor of defendant. We affirm.

This appeal arises from a dispute pertaining to the rental rate to be charged on renewal of a lease agreement. Defendant, Downriver Community Center, owns real property comprised of a 160,000 square foot office complex in Southgate, Michigan. On December 15, 2000, defendant entered into a lease agreement with Plaintiff, Horizon Properties, L.L.C., as a tenant leasing approximately 34,900 square feet of interior space along with exterior space comprised of a football field and playground.¹ In the original lease agreement, the leased space consisted of 21,711 square feet of office space used for classrooms, at a rental rate of \$9.50 a square foot and approximately 13,189 square feet of space used as a gymnasium, at a rental rate of \$6.00 a square foot.

Relevant to the issues in this appeal, the parties in the lower court sought summary disposition disputing the rental rate to be charged to plaintiff following renewal of the lease agreement. Specifically, plaintiff argued that the maximum rental increase, pursuant to the lease

¹ Plaintiff subleased the space to a Montessori School serving children from kindergarten through eighth grade. Rental fees for the exterior space are set at \$500 a month and are separate from, and in addition to, fees for the interior space.

agreement, was ten percent over the original rental rates for the leased space and contended that the differential rental rates for the classroom and gymnasium space should be maintained on lease renewal. After taking the matter under advisement, the trial court issued an opinion and order on May 3, 2007, which stated in relevant part:

The Court finds that the language of the lease concerning the renewal rent increase is not ambiguous but when read indicates the amount charged is the greater amount of the average rental amount on charged tenants or a maximum of 10% increase. The alternatives clearly indicate an intent to provide landlord the opportunity to charge a renewal rent increase in the greater amount of the two options available while providing some certainty to tenant that if the market conditions didn't increase the rent then the amount of increase would be capped at 10%.

Although the original lease provides for different amounts for rent for office space and gymnasium in the five year term of the lease, the renewal language makes no such distinction. Therefore, this Court finds that the greater amount of the rent renewal is to be applied to both office space and gymnasium space. Plaintiff's Motion for Summary Disposition on the issue of rental rate increase is DENIED and Defendant's Motion for Summary Disposition as to the amount of renewal rent is GRANTED.

This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Zsigo v Hurley Medical Ctr*, 475 Mich 215, 220; 716 NW2d 220 (2006). The interpretation of a contract also comprises a question of law, which we review de novo, *Burkhardt v Bailey*, 260 Mich App 636, 646; 680 NW2d 453 (2004), "including whether the language of a contract is ambiguous and requires resolution by the trier of fact." *DaimlerChrysler Corp v Tech Professional Staffing, Inc*, 260 Mich App 183, 184-185; 678 NW2d 647 (2003).

Relevant portions of the original lease agreement, executed by the parties, are as follows:

2. Term. The term of this Lease for the Demised Premises shall be for one five (5) year term with three (3) five (5) year renewal terms (subject to earlier termination as provided herein) from and after the date of commencement of the term of this Lease, as hereinafter provided. If, however, the commencement date falls on a day other than the first day of a month, then the term of this Lease shall extend for five (5) full years, commencing with the first full month following the commencement date. *The renewal rate for each renewal term shall be the greater of the average rate of existing tenant lease rates for the Office Complex at the time of renewal or a maximum increase per renewal term of ten percent.* In no event shall the renewal rate be less than the original Base Rental Rate. [Emphasis added.]

* * *

4. Base Rental Rate.

A. Interior Premises. Tenant agrees to pay Landlord during the five (5) year term of this Lease the aggregate Base Rental Rate, as may be adjusted at each renewal date, of \$1,331.813.20 Dollars (\$9.50 per square foot for office space identified on Exhibit B totaling 21,711 square feet and \$6.00 per square foot for gym space identified on Exhibit B totaling 13,189 square feet), payable in successive Base Monthly Rent installments, in the aggregate amount of \$23,782.38 per month, payable in advance on or before the first day of each month (the “Rent Date”), without prior demand and without any deduction or set off whatsoever, such covenant by Tenant to pay rent being independent of the covenants of Landlord under this Lease.

Initially, plaintiff contends the lease terms pertaining to the rental renewal rate are ambiguous. Citing ¶ 2 of the lease agreement, *supra*, plaintiff argues that use of the word “maximum” with the phrase “the greater of” creates an ambiguity. Specifically, plaintiff asserts that reading the language of this provision, in accordance with the trial court’s ruling, as permitting defendant to charge the greater of (a) the average existing tenant rates at the time of renewal and (b) ten percent, renders the word “maximum” superfluous. In contrast, plaintiff contends the language of the provision should be read, allegedly in conformity with the intent of the parties, to provide for renewal rental rates to be capped at a maximum of ten percent, regardless of the average tenant rates, even though plaintiff concedes that this interpretation renders the phrase “the greater of” superfluous. As such, plaintiff argues the lease language is “patently ambiguous” and must be construed in its favor as the tenant.

When interpreting a contract, the primary goal is to enforce the intent of the parties. *Burkhardt, supra* at 656. Unambiguous terms are to be construed in accordance with their plain and ordinary meaning. *Busch v Holmes*, 256 Mich App 4, 7-8; 662 NW2d 64 (2003). “A contract is ambiguous only if its language is reasonably susceptible to more than one interpretation.” *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 13; 614 NW2d 169 (2000). “Courts must be careful not to read an ambiguity . . . where none exists.” *Auto-Owners Ins Co v Harvey*, 219 Mich App 466, 469; 556 NW2d 517 (1996). When contract language is clear and unambiguous it cannot “be rewritten under the guise of interpretation.” *South Macomb Disposal Auth v American Ins Co (On Remand)*, 225 Mich App 635, 653; 572 NW2d 686 (1997).

Plaintiff contends that the following language of the lease agreement is patently ambiguous:

The renewal rate for each renewal term shall be the greater of the average rate of existing tenant lease rates for the Office Complex at the time of renewal or a maximum increase per renewal term of ten percent.

“A patent ambiguity is one ‘that clearly appears on the face of a document, arising from the language itself.’” *Grosse Pointe Park v Liability Pool*, 473 Mich 188, 198; 702 NW2d 106 (2005), quoting Black’s Law Dictionary (7th ed). More specifically, a patent ambiguity has been defined as “one apparent upon the face of the instrument, arising by reason of inconsistency, obscurity or an inherent uncertainty of the language adopted, such that the effect of the words in the connection used is either to convey no definite meaning or a double one.” *Zilwaukee Twp v Railway Co*, 213 Mich 61, 69; 181 NW 37 (1921). Further, “if a contract, even an inartfully

worded or clumsily arranged contract, fairly admits of but one interpretation, it may not be said to be ambiguous or fatally unclear.” *Michigan Twp Participating Plan v Pavolich*, 232 Mich App 378, 382; 591 NW2d 325 (1998).

Plaintiff’s argument is particularly strained in an effort to create an inconsistency where none exists. Based on the clear language of the cited lease provision, we fail to discern any alleged ambiguity. Taking the language as written the provision, “[t]he renewal rate for each renewal term” is defined as comprising “the greater of the average rate of existing tenant lease rates for the Office Complex at the time of renewal or a maximum increase per renewal term of ten percent.” The term “greater” is defined in *The American Heritage Dictionary of the English Language* (1985) as, alternatively: “2. Larger than others of the same kind 3. Large in quantity or number.” The term “or” is “used to connect words, phrases, or clauses representing alternatives.” *Random House Webster’s College Dictionary* (1997). Using these definitions, the disputed provision provides for the larger of two methods of calculation to comprise the rental renewal rate – either “the average rate of existing tenant lease rates” or, alternatively, “a maximum increase . . . of ten percent.” This interpretation is not only clear and unambiguous, but is consistent with the determination of the trial court, which we affirm.

Finally, plaintiff argues the trial court erred in failing to construe the lease agreement “as a whole” when it determined that defendant could charge the same rate on renewal for all leased square footage rather than maintain the differential rates of the original lease for office and gymnasium space. Plaintiff contends the rates in the original lease demonstrates the intention of the parties to attribute a different value to each type of space based on its commercial value and comprises a latent ambiguity.

A latent ambiguity is defined as “one ‘that does not readily appear in the language of a document, but instead arises from a collateral matter when the document’s terms are applied or executed.’” *Grosse Pointe Park, supra* at 198, citing Black’s Law Dictionary (7th ed). Notably, “where a latent ambiguity exists in a contract, extrinsic evidence is admissible to indicate the actual intent of the parties as an aid to the construction of the contract.” *Grosse Pointe Park, supra* at 198. Plaintiff contends that the existence of differential lease rates within the contract evidence the intention of the parties to be charged at separate rates based on the commercial use or value of each type of space (i.e., classroom space versus gymnasium space).

A cardinal rule followed for the interpretation of a contract requires:

[A] contract is to be construed as a whole; that all its parts are to be harmonized so far as reasonably possible; that every word in it is to be given effect, if possible; and that no part is to be taken as eliminated or stricken by some other part unless such a result is fairly inescapable. [*Laevin v St Vincent De Paul Society*, 323 Mich 607, 609-610; 36 NW2d 163 (1949) (internal citations omitted).]

Similar to plaintiff’s assertions of the existence of an ambiguity pertaining to the methodology to calculate the renewal rate, we determine that no latent ambiguity exists with regard to the “base rental rate” for the “interior premises.” Pursuant to ¶ 4, subsection A of the lease agreement, the “five (5) year term of this Lease” defines the amount to be paid for the respective area by the square foot. However, there is no language within the lease agreement extending such terms to

future renewals of the contract. Rather, this provision specifically designates that the rate “may be adjusted at each renewal date.” It is presumed in the law that parties comprehend the import and meaning of a written contract and had the intention expressed by its terms. *Zurich Ins Co v CCR & Co (On Rehearing)*, 226 Mich App 599, 604; 576 NW2d 392 (1997). Arguably, had the parties intended to retain a differential rental rate for the areas, this could have been included within the renewal language of the lease, as provided for in the original terms.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Jane E. Markey
/s/ Michael J. Talbot