

STATE OF MICHIGAN
COURT OF APPEALS

GAUGI PROPERTIES, INC.,

Plaintiff-Appellee,

v

DAMAN & NISSAN, INC.,

Defendant-Appellant.

UNPUBLISHED

October 10, 2013

No. 310991

Wayne Circuit Court

LC No. 11-006484-CH

Before: BECKERING, P.J., and O'CONNELL and SHAPIRO, JJ.

PER CURIAM.

In this declaratory action to construe the terms of a contract, defendant appeals as of right the April 23, 2012, order granting judgment to plaintiff. We affirm.

This case arises out of the sale of a grocery store from Big Apple Fruit Market, Inc., a third party, to defendant, and a subsequent lease between defendant and plaintiff involving the real property on which the business was located. On May 17, 2005, after defendant purchased the business from Big Apple Fruit Market, it entered into an agreement (the Lease Agreement) to lease the real property from plaintiff. The Lease Agreement contained a clause giving defendant an option to purchase the property. The option to purchase provided that defendant was to have credit towards the purchase price upon the exercise of the option. The amount of credit due defendant is the subject of this action. The pertinent language in the Lease Agreement providing for the option to purchase, as well as the amount of credit due defendant, is as follows:

Purchaser shall have the first option to purchase the real estate where the subject business is located, for the purchase price of One Hundred Seventy Five Thousand and 00/100 (\$175,000.00) Dollars, whenever the business debt owed by the Purchaser to Big Apple Fruit Market, Inc., is paid in full and if the Purchaser is not in default. The purchase price shall be on a [sic] land contract terms for a period of 60 months at 7 (7%) [sic] interest per annum, on the unpaid balance Further, if the Purchaser exercised his [sic] option to purchase the real estate, then it shall have credit equal to the monthly base rental obligation already paid, after deducting seven (7%) percent interest rate per annum from the credit given, using a monthly amortization method.

On May 16, 2011, defendant sought to exercise its option to purchase the property as provided in the Lease Agreement. At that time, defendant claimed a credit against the \$175,000

purchase price in the amount of \$79,500. Defendant arrived at this figure by subtracting the interest rate, seven percent, from the total amount paid under the Lease Agreement. Plaintiff disputed the amount of credit to which defendant was due, and on June 1, 2011, filed a complaint seeking declaratory relief as to the amount of credit due. At that time, plaintiff alleged that the amount of credit to which defendant was due was \$10,535.08. This amount represented the total amount of rent paid by defendant under the Lease Agreement, minus the interest, which accrued at a rate of seven percent annually, on the principal amount of \$175,000 from the time the parties entered into the Lease Agreement.

The trial court instructed the parties to brief, among other issues, the meaning of the language employed in the option to purchase clause of the Lease Agreement with regard to the amount of credit due defendant. After both parties submitted trial briefs, the trial court, at a February 21, 2012, settlement conference, *sua sponte* granted judgment to plaintiff because it found that the language employed in the Lease Agreement supported plaintiff's position. Although the trial court's order did not cite any court rule, we conclude from the context of the trial court's order that it granted summary disposition to plaintiff pursuant to MCR 2.116(I)(1), which permits the trial court to *sua sponte* grant summary disposition.

Defendant first challenges the trial court's interpretation of the language employed in the option to purchase clause contained in the Lease Agreement. We review de novo the trial court's grant of summary disposition pursuant to MCR 2.116(I)(1). *Kenefick v Battle Creek*, 284 Mich App 653, 654; 774 NW2d 925 (2009). Additionally, we review de novo questions concerning the proper interpretation of a contract and whether the contract is ambiguous. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 503-504; 741 NW2d 539 (2007).

"The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties." *Shay v Aldrich*, 487 Mich 648, 660; 790 NW2d 629 (2010) (quotation omitted). "An unambiguous contractual provision reflects the parties' intent as a matter of law, and '[i]f the language of the contract is unambiguous, we construe and enforce the contract as written.'" *Holland v Trinity Health Care Corp*, 287 Mich App 524, 527; 791 NW2d 724 (2010), quoting *Quality Prods & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003). It is the duty of the courts to interpret an unambiguous contract. *Miller-Davis Co v Ahrens Const, Inc (On Remand)*, 296 Mich App 56, 64; 817 NW2d 609 (2012). Further, when the plain language of a contract is clear and unambiguous, parol or extrinsic evidence is not admissible to vary the terms of the contract. *Meagher v Wayne State Univ*, 222 Mich App 700, 722; 565 NW2d 401 (1997). Where a term or phrase is not defined in a contract, the lack of a definition does not render the contract ambiguous; furthermore, extrinsic evidence that is used to explain an undefined term or phrase does not violate the parol evidence rule. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 354; 596 NW2d 190 (1999); *Wells Fargo Bank, NA v Cherryland Mall Ltd Partnership*, 295 Mich App 99, 115; 812 NW2d 799 (2011), remanded on other grounds 493 Mich 859 (2012).

In this case, both parties argue that the Lease Agreement is unambiguous, and that the unambiguous language employed therein supports their respective positions. Their dispute involves the interpretation of the phrase "using a monthly amortization period."

The trial court did not err in applying this phrase. The phrase reads, in pertinent part, that defendant “shall have credit equal to the monthly base rental obligation already paid, after deducting seven (7%) percent interest rate per annum from the credit given, using a monthly amortization method.” Initially, the entire clause unambiguously asserts that defendant is to receive credit based on the amount of monthly rent already paid. The clause continues and instructs that the amount of credit given is to be offset as follows: “after deducting seven (7%) percent interest rate per annum from the credit given, using a monthly amortization method.” Black’s Law Dictionary (8th ed) defines amortization as “[t]he act or result of gradually extinguishing a debt, such as a mortgage [] by contributing payments of principal each time a periodic interest payment is due.” Further, an “amortized loan” is “[a] loan calling for periodic payments that are applied first to interest and then to principal, as provided by the terms of the note.” Thus, the term “amortization” anticipates that there is a principal balance, as well as interest that accrues on that balance. In order to give effect to the phrase “after deducting seven (7%) percent interest rate per annum from the credit given, using a monthly amortization method,” there has to be a principal balance that is amortized, as well as an interest rate. Otherwise, the phrase “using a monthly amortization method” would be rendered nugatory. When interpreting a contract, a reviewing court should avoid an interpretation that would render nugatory terms or phrases. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003).

Here, the principal balance against which interest is to accrue at a rate of seven percent annually is the purchase price of \$175,000. Pursuant to the plain language of the Lease Agreement, the amount of credit to which defendant is entitled is the total amount of rent paid under the Lease Agreement, minus a “seven (7%) percent” interest rate per annum . . . using a monthly amortization method.” Because the only principal balance from which a seven percent interest rate could be calculated is the \$175,000 purchase price, the only reasonable interpretation of the challenged phrase is to conclude that the amount of credit to which defendant is due is the monthly rent paid by defendant, minus the interest that accrues on the \$175,000 principal balance. Accordingly, pursuant to the unambiguous language of the contract, the credit to which defendant is due upon the exercise of its option to purchase is the amount of monthly rent paid by defendant, minus the accrued interest on the principal balance of the purchase price, using a seven percent interest rate per annum and a monthly amortization method.

In reaching this conclusion, we note that defendant’s proposed interpretation of the Lease Agreement ignores the use of the terms “interest rate per annum” and “amortization,” as defendant’s position does not anticipate the accrual of any interest. Defendant simply contends that seven percent should be deducted from the amount of rent paid to plaintiff over the course of the Lease Agreement. The term “interest rate” is defined by Black’s Law Dictionary (8th ed) as follows: “[t]he percentage that a borrower of money must pay to the lender in return for the use of the money [often] expressed as a percentage of the principal payable for a one-year period.” Here, the principal amount is the \$175,000 purchase price. Thus, the term “interest rate” logically applies to the purchase price and the rate that interest is to accrue thereon, and not simply to a seven percent reduction in the total amount of defendant’s rent payments.

Further, we find that the Lease Agreement is unambiguous despite its awkward drafting. For instance, the phrase “after deducting seven (7%) interest rate per annum from the credit

given, using a monthly amortization method” does not expressly refer to the \$175,000 purchase price as the principal amount. Further, the phrase does not expressly declare that the amount of credit to which defendant is due is the difference between its rental payments and the accrued interest on the purchase price of \$175,000. However, an “inartfully worded or clumsily arranged” contract is not ambiguous where it “fairly admits of but one interpretation” *Meagher*, 222 Mich App at 722. Despite the inartful drafting of the option to purchase clause, the contract admits of but one interpretation. Indeed, when meaning is given to the terms “amortization” and “interest rate,” and those terms are read in context, the only rational construction of the Lease Agreement is that there is a principal balance upon which interest accrues and that the amount of interest that accrues on the \$175,000 principal is the amount against which defendant’s rent payments must be credited. Moreover, the only rational view of the Lease Agreement imparts that the \$175,000 purchase price is the principal balance, based on the fact that the \$175,000 purchase price is located in the same paragraph that contains the option to purchase clause. See *Miller-Davis Co (On Remand)*, 296 Mich App at 65 (contractual terms are to be read in context).

Defendant next argues that the trial court erred because, although it concluded that the Lease Agreement was unambiguous, it considered extrinsic evidence in violation of the parol evidence rule. Defendant argues that the trial court considered extrinsic evidence because the order granting judgment to plaintiff stated that the trial court agreed with plaintiff’s position as described in its trial brief and because plaintiff’s trial brief cited extrinsic evidence in the form of a previous agreement between the parties as well as an amortization schedule. When a contract is unambiguous, the parol evidence rule bars consideration of extrinsic evidence to vary the terms of the contract. *Meagher*, 222 Mich App at 722. Defendant’s argument fails because the record does not support the claim that the trial court considered extrinsic evidence in violation of the parol evidence rule, and we will not speculate concerning facts that have not been established. Although the trial court’s order stated the trial court agreed with plaintiff’s position as set forth in plaintiff’s trial brief, there is no indication that the trial court impermissibly considered the extrinsic evidence offered by plaintiff.¹ Indeed, the trial court stated at the settlement conference that it relied on the plain language of the Lease Agreement, and its order indicated that the decision was based on the use of the word “amortization” in the Lease Agreement. Defendant, as the appellant, fails to satisfy its burden of providing this Court with the factual basis supporting its argument. *Petraszewsky v Keeth (On Remand)*, 201 Mich App 535, 540; 506 NW2d 890 (1993).

Next, defendant argues that it was denied procedural due process because it was denied notice and an opportunity to be heard when the trial court *sua sponte* granted summary disposition pursuant to MCR 2.116(I)(1). Defendant failed to preserve this issue because it raised the issue for the first time in its motion for reconsideration. *Vushaj v Farm Bureau Gen*

¹ As to defendant’s speculation that the trial court considered the amortization schedule attached to plaintiff’s trial brief, if the trial court had considered this document, such consideration would not have been inappropriate because parol evidence is admissible to explain an undefined term in an unambiguous contract. *Wells Fargo Bank, NA*, 295 Mich App at 115.

Ins Co of Mich, 284 Mich App 513, 519; 773 NW2d 758 (2009). Therefore, our review is for plain error affecting substantial rights. *Rivette v Rose-Molina*, 278 Mich App 327, 328; 750 NW2d 603 (2008).

MCR 2.116(I)(1) permits the trial court to *sua sponte* grant summary disposition. *Boulton v Fenton Twp*, 272 Mich App 456, 462-463; 726 NW2d 733 (2006).

Indeed, the rule mandates that if one of two conditions is met, then the court “shall render judgment without delay.” These conditions are: [(1)] the “pleadings show that a party is entitled to judgment as a matter of law” and [(2)] “the affidavits or other proofs show that there is no genuine issue of material fact.” [*Id.* at 463, quoting MCR 2.116(I)(1).]

While the trial court has authority to grant summary disposition pursuant to MCR 2.116(I)(1), “the trial court may not do so in contravention of a party’s due process rights.” *Al-Maliki v LaGrant*, 286 Mich App 483, 489; 781 NW2d 853 (2009). “Due process is a flexible concept, the essence of which requires fundamental fairness. The basic requirements of due process in a civil case include notice of the proceeding and a meaningful opportunity to be heard.” *Id.* at 485 (internal citation omitted).

We do not find that defendant was denied notice and an opportunity to be heard where defendant was requested by the trial court to brief this very issue before the February 21, 2012, settlement conference, and where defendant actually briefed the issue. Further, the record reveals that the trial court, at the February 21, 2012, settlement conference, stated that it read the parties’ trial briefs before it granted summary disposition to plaintiff. And, contrary to defendant’s assertions, we do not find that the 28-day notice period provided in MCR 2.116(B)(2) applies where the trial court *sua sponte* grants summary disposition pursuant to MCR 2.116(I)(1). The plain language of MCR 2.116(B)(2) does not provide that the rule applies in such a scenario. Furthermore, even if the trial court’s *sua sponte* grant of summary disposition denied defendant notice and an opportunity to be heard, such a denial was rendered harmless when defendant moved for reconsideration. *Al-Maliki*, 286 Mich App at 485-486; *Boulton*, 272 Mich App at 463. Here, defendant moved for reconsideration and presented its arguments to the trial court. In an order indicating that it read and considered defendant’s arguments, the trial court denied reconsideration. Where the trial court considers a party’s arguments in a motion for reconsideration and denies the motion, any error in denying that party notice and a full and fair opportunity to respond to a *sua sponte* grant of summary disposition is rendered harmless. *Boulton*, 272 Mich App at 463-464. Defendant does not establish plain error requiring reversal.

Finally, defendant raises as an alternative argument that the Lease Agreement was ambiguous, and that an affidavit from the attorney who drafted the agreement demonstrates that the parties intended for the Lease Agreement to comport with defendant’s interpretation of the document. Because we find that the contract was unambiguous, we find that the trial court did not err by enforcing the plain language of the agreement, and we reject defendant’s argument. See *Holland*, 287 Mich App at 527. Furthermore, defendant’s affidavit cannot be used to vary the plain language of the unambiguous agreement. *Meagher*, 222 Mich App at 722.

Affirmed.

/s/ Jane M. Beckering

/s/ Peter D. O'Connell

/s/ Douglas B. Shapiro