

STATE OF MICHIGAN
COURT OF APPEALS

RIVER SQUARE UNIVERSITY LLC and CMP 2,

Plaintiffs-Appellants,

v

ASPECT PROPERTIES LLC, BRIAN
DIBARTOLOMEO, and VALERIE
DIBARTOLOMEO,

Defendants-Appellees.

UNPUBLISHED

April 16, 2020

No. 347452

Oakland Circuit Court

LC No. 2017-159141-CB

Before: SAWYER, P.J., and LETICA and REDFORD, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court’s default judgment against defendants, awarding plaintiffs damages and statutory interest. Although plaintiffs do not challenge the entry of the default judgment, they object to the trial court’s damage award because it denied them posteviction damages. We reverse and remand for further proceedings concerning the damages awarded.

I. BACKGROUND

This matter arises out of a dispute regarding defendants’ commercial lease of plaintiffs’ commercial property. Plaintiffs and defendants entered into a five-year lease, from October 2015 to October 2020.¹ Defendants Brian and Valerie DiBartolomeo personally guaranteed defendant Aspect Properties, LLC’s lease obligations. From January 2016 through November 2016, defendants failed to pay the full amount of rent due. In December 2016, defendants stopped paying rent altogether. Plaintiffs served defendants with a demand for possession the following month. The next month, plaintiffs filed a summary proceeding action in the district court to recover possession of the premises. In April 2017, the district court entered an order granting plaintiffs’ motion for summary disposition and a judgment for possession. The district court ordered that

¹ The parties agreed to a first amended lease in December 2015, increasing the space leased and modifying the resultant rent, but kept all other lease terms in full force.

plaintiffs were entitled to all fees, including attorney fees, and charges allowed under the lease, as well as applicable statutory costs. On April 25, 2017, plaintiffs obtained an order of eviction. Three days later, defendants vacated the premises.

Thereafter, plaintiffs filed a complaint against defendants in the circuit court, alleging breaches of contract pertaining to the lease and the guarantees. By August 2017, a default was entered against defendants for failure to answer plaintiffs' complaint. In December, plaintiffs moved for entry of a default judgment for rent and damages from January 2016, the date of defendants' breach, through October 2020, the end of the lease term.

In June 2018, the trial court held an evidentiary hearing on damages. In December 2018, the trial court issued an opinion and order regarding the amount of damages. The trial court denied plaintiffs damages after April 28, 2017, the date that defendants had vacated the premises, because the lease did not contain an acceleration clause. Consequently, the trial court concluded that it was not required to determine whether plaintiffs had made efforts to mitigate their damages after defendants were evicted. The trial court also found that Brian and Valerie DiBartolomeo were personally liable for the damages awarded.

In December 2018, plaintiffs re-leased the subject premises. The following month, plaintiffs filed a motion for entry of a final default judgment, arguing that the trial court should state the exact amount of damages defendants owed.

On January 24, 2019, the trial court entered a final default judgment in the amount \$54,962.00.² The judgment would earn postjudgment interest under the lease at 18% per annum and would earn statutory interest until it was satisfied.

Plaintiffs filed a motion for reconsideration, challenging the court's failure to award posteviction damages. The trial court denied this motion.

This appeal followed.

² More specifically, the trial court awarded:

- \$18,203.00 for the base rent due from January 2016 through April 2017;
- \$1,600.00 in administrative fees from January 2016 through April 2017;
- \$7,362.00 for 18% interest on the unpaid amount due from January 2016 through April 2017;
- \$12,125.00 in daily late fees for rent due from January 2016 through April 2017;
- \$11,373.00 for attorney fees and costs;
- \$1,538.00 for other damages [repair costs]; and
- \$2,761.00 in statutory interest from the date of suit to the date of judgment.

II. DISCUSSION

Plaintiffs argue the trial court erred by finding they were not entitled to posteviction damages because the lease did not contain an acceleration clause. We agree.

A. ISSUE PRESERVATION

On appeal, plaintiffs argue that paragraphs 27 and 49 of the lease entitle them to posteviction damages. Defendants contend plaintiffs failed to specifically argue for posteviction damages under these paragraphs below and, therefore, failed to preserve this issue. Plaintiffs reply that the issue was preserved because the lease was admitted as an exhibit during the hearing on damages.

It is undisputed that the trial court admitted the lease into evidence. At the hearing, plaintiffs argued entitlement to posteviction damages, but without specific reference to paragraphs 27 and 49. After the hearing, the trial court permitted plaintiffs and defendants to submit additional documents regarding the amount of damages defendants owed. Plaintiffs filed a postevictionary brief, claiming that defendants owed \$35,438.00 in rent from January 2016 through April 2017, and \$219,599.00 in posteviction damages from May 2017 through June 2018, asserting that they were entitled to the benefit of their bargain. Again, plaintiffs did not specifically argue entitlement to posteviction damages under paragraphs 27 and 49. Regardless, consistent with their initial complaint, plaintiff argued that they were entitled to any damages provided for under the terms of the lease.

When the trial court issued its opinion and order, it found that the lease did not contain an acceleration clause, and, therefore, plaintiffs were not entitled to future damages. The trial court declined to address mitigation, determining it unnecessary, and, then, it ordered defendants to pay rent from January 2016 through April 2017 only.

Plaintiffs filed a motion for reconsideration, specifically contending, that they were entitled to posteviction damages through December 31, 2018 under paragraphs 27 and 49. Plaintiffs also argued that they were entitled to any other additional month's rent from January 2019 through October 2020, as each month became due if they were unable to mitigate their damages.

The trial court denied plaintiffs' motion for reconsideration, stating that it "merely presents the same issues ruled upon by the Court either expressly or by reasonable implication." As such, we conclude that plaintiffs' reliance on the lease was sufficient to preserve their current argument under paragraphs 27 and 49 of the lease. And, even if we were persuaded by defendants' stance that reliance on these specific paragraphs constituted a new argument, we would review it as "an issue of law for which all the relevant facts are available." *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich App 513, 519; 773 NW2d 758 (2009).

B. STANDARD OF REVIEW

"The interpretation of contractual language, as well as the determination of whether that contractual language is ambiguous, is a question of law that we review de novo." *Kyocera Corp v Hemlock Semiconductor, LLC*, 313 Mich App 437, 445; 886 NW2d 445 (2015). We review "the trial court's determination of damages following a bench trial for clear error." *Alan Custom*

Homes, Inc v Krol, 256 Mich App 505, 513; 667 NW2d 379 (2003). “The clear error standard provides that factual findings are clearly erroneous where there is no evidentiary support for them or where there is supporting evidence but the reviewing court is nevertheless left with a definite and firm conviction that the trial court made a mistake. In other words, a finding of clear error means that the trial court made a mistake.” *Hill v City of Warren*, 276 Mich App 299, 308; 740 NW2d 706 (2007) (citation omitted). But, a trial court’s conclusions of law are reviewed de novo, *Omnicom v Gianetti Investment Co*, 221 Mich App 341, 348; 561 NW2d 138 (1997), and misapplication of controlling legal principles to found facts warrants reversal. See *Fraser Pub Schs v Kolon*, 35 Mich App 441, 443; 193 NW2d 64 (1971).

C. ANALYSIS

“A lease is a contract[.]” *Mulliken v Naph-Sol Ref Co*, 302 Mich 410, 413; 4 NW2d 707 (1942); see also *G & A Inc v Nahra*, 204 Mich App 329, 330-331; 514 NW2d 255 (1994) (“Contractual language is given its ordinary and plain meaning, and technical and constrained constructions are avoided. The disputed language in the lease stated that the tenant could occupy the property[.]” (citation omitted)). “When a contract is unambiguous, it must be enforced according to its terms.” *Hamade v Sunoco, Inc (R & M)*, 271 Mich App 145, 166; 721 NW2d 233 (2006). “Plain and unambiguous contract language cannot be rewritten by the Court under the guise of interpretation, as the parties must live by the words of their agreement.” *Harbor Park Market, Inc v Gronda*, 277 Mich App 126, 130-131; 743 NW2d 585 (2007) (quotation marks omitted). “However, if the contractual language is ambiguous, extrinsic evidence can be presented to determine the intent of the parties.” *Kendzierski v Macomb Cty*, 503 Mich 296, 311; 931 NW2d 604 (2019) (quotation marks omitted). A “contract is ambiguous when its provisions are capable of conflicting interpretations. Accordingly, if two provisions of the same contract irreconcilably conflict with each other, the language of the contract is ambiguous.” *Klapp*, 468 Mich at 467 (citation and quotation marks omitted). “Unclear portions of a lease are construed against lessors, unless the lessee drafted it.” *Carl A Schuberg, Inc v Kroger Co*, 113 Mich App 310, 313; 317 NW2d 606 (1982).

“A cause of action for breach of contract accrues when a contracting party fails to do what he is obligated to do under the contract.” *Jacobs v Detroit Auto Inter-Ins Exch*, 107 Mich App 424, 431; 309 NW2d 627 (1981). “[C]ausation of damages is an essential element of any breach of contract action[.] A party asserting a breach of contract must establish by a preponderance of the evidence that (1) there was a contract (2) which the other party breached (3) thereby resulting in damages to the party claiming breach.” *Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161, 178; 848 NW2d 95 (2014).

In this case, the first two elements are not in dispute. Only the third element, whether defendants’ breach entitled plaintiffs to posteviction damages, is at issue. *Id.*

“[T]ypically, a plaintiff’s remedy for breach of contract is limited to damages that arise naturally from the breach or those that were in the contemplation of the parties at the time the contract was made.” *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 426 n 3; 751 NW2d 8 (2008) (quotation marks omitted). “Generally, re-entry by the lessor and surrender by the lessee in obedience to writ of restitution precludes recovering damages after eviction. But the parties may contract that the provision of the lease for damages upon termination of the lease because of

default of the lessee shall survive the restitution of the premises.” *Central Trust Co v Wolf*, 255 Mich 8, 12; 237 NW 29 (1931).

Though the lease term at issue extended from October 2015 to October 2020, the lease did not contain an acceleration clause. The absence of an acceleration clause, however, is not dispositive because such a clause would have only dictated that the payments were due immediately. See *e.g.*, *Sparta State Bank v Covell*, 197 Mich App 584, 587; 495 NW2d 817 (1992) (“[W]hen an installment contract does not contain an acceleration clause, claims based upon a breach of the installment contract accrue, and the statute of limitations begins to run, as each separate installment falls due. In the absence of an acceleration clause, claims on an installment contract do not accrue until the installment becomes due.”). Thus, while the trial court was correct that, in the absence of an acceleration clause, plaintiffs were not entitled to yet undetermined and unknowable future damages to the lease’s end date, it erred in failing to address whether plaintiffs were entitled to posteviction damages under the terms of the lease to the extent that such damages had accrued.

Resolving the issue of whether plaintiffs are entitled to posteviction damages under paragraphs 27 and 49 requires review of the lease’s plain language. *Harbor Park Market, Inc*, 277 Mich App at 130-131.

Paragraph 27 discusses the consequences of the tenant’s default, stating:

DEFAULT—If Tenant shall default in the payment of rent or other amounts and such default shall continue for seven (7) days after written notice to Tenant or Tenant shall default in the performance of any other obligation of Tenant hereunder and such default shall continue for thirty (30) days after written notice to Tenant, or if the Premises be vacated, or if any of the events recited in Paragraph 17^[3] shall occur, Landlord may, in addition to all other remedies permitted by law:

(a) terminate this Lease by notice to Tenant and recover Landlord’s damages from Tenant.

(b) With or without terminating this Lease, re-enter and repossess the Premises, and Tenant and each and every occupant remove and put out, preserving the Landlord’s right of damages. In addition to all other damages provided by law, Tenant shall pay Landlord the expenses incurred in obtaining possession of the Premises, including attorney fees, and all expenses incurred in and about reletting the same and if Landlord relets the Premises, each month the excess of the amounts payable by Tenant hereunder over the amounts actually received by Landlord on account of such month from such reletting.

Regardless of plaintiffs’ ability to evict defendants and regain possession of the premises, paragraph 27(b)’s plain language entitled plaintiffs to the following posteviction damages:

³ Paragraph 17 concerns assignments and subleases and is not relevant to the issue on appeal.

- (1) all other damages provided by law;
- (2) expenses incurred in repossessing the premises, including attorney fees;
- (3) expenses incurred in re-leasing the premises; and
- (4) the difference between the monthly amount of base rent owed under the lease by defendants and the base rent paid by plaintiffs' new tenant(s) after re-leasing the premises.

Paragraph 27's unambiguous language dictates that plaintiffs are entitled to "all other damages by law" in the event of a tenant's default. "In an action based on contract, the parties are entitled to the benefit of the bargain as set forth in the agreement." *Ferguson v Pioneer State Mut Ins Co*, 273 Mich App 47, 54; 731 NW2d 94 (2006). "The proper measure of damages for a breach of contract is the pecuniary value of the benefits the aggrieved party would have received if the contract had not been breached." *Id.* (quotation marks omitted).

Approximately two years into the lease that began in October 2015 and ended in October 2020, defendants were evicted for failure to pay monthly rents when due. Although damages are generally precluded after the eviction period, *Central Trust Co*, 255 Mich at 12, the plain language of the damages provision in paragraph 27 indicates plaintiffs are entitled to repossess the premises while preserving the landlords' right to damages. Paragraph 27 comports with our caselaw because "parties may contract that the provision of the lease for damages upon termination of the lease because of default of the lessee shall survive the restitution of the premises." *Id.* Thus, plaintiffs are entitled to damages under paragraph 27, "[w]ith or without terminating this Lease."

Paragraph 49 of the lease agreement further buttresses plaintiffs' contention that plaintiffs were entitled to legally pursue posteviction damages because it provides for cumulative rights and remedies:

RIGHTS AND REMEDIES CUMULATIVE—The rights and remedies provided by this lease are cumulative and the use of any one right or remedy by either party shall not preclude or waive its right to use any or all other remedies. Said rights and remedies are given in addition to any other rights the parties may have by law, statute, ordinance or otherwise.

This language is unambiguous and allows the parties to pursue all available rights and remedies. Consequently, plaintiffs neither waived their right to pursue a civil action based on the breach of contract against defendants, nor their remedies after they successfully obtained an order of eviction against defendants. See *Central Trust Co*, 255 Mich at 12 ("[P]arties may contract that the provision of the lease for damages upon termination of the lease because of default of the lessee shall survive the restitution of the premises.").

Under paragraph 27 of the lease, however, the proper measure of posteviction damages is the amount of rent owed by defendants after their eviction until, and subject to, proper mitigation by plaintiffs in re-leasing the property. *Ferguson*, 273 Mich App at 54 ("The proper measure of damages for a breach of contract is 'the pecuniary value of the benefits the aggrieved party would have received if the contract had not been breached.' "). Moreover, the plain language of

paragraph 27 states that plaintiffs are entitled to “expenses incurred in repossessing the premises, including attorney fees,” if defendants are in default by failing to pay rent. Similarly, paragraph 46 of the lease provides for attorney fees and costs in the event of breach. Paragraph 46 states:

The parties agree that if any party commences an action against another party as the result of the breach or attempted breach of this agreement, *then jurisdiction shall be found in the 52-3rd Judicial Court or the Oakland County Circuit Court exclusively*; whichever venue may be appropriate under the circumstances. *All attorney fees and costs incurred by Landlord or its assigns to enforce this agreement shall be paid by Tenant and shall become a part of the judgment entered by the Court.* Interest shall be awarded at the judicial rate for written instruments from the date of breach. [emphasis added.]

As we already discussed, defendants defaulted in January 2016 when they failed to pay the full amount of rent due.

With regard to plaintiffs’ duty to mitigate damages, paragraph 27 states that plaintiffs are entitled to “all expenses incurred in and about reletting” the premises, if defendants are in default by failing to pay rent. The final provision of paragraph 27 states, “if the Landlord relets the Premises,” then plaintiffs are entitled to “each month the excess of the amounts payable by Tenant hereunder over the amounts actually received by the Landlord on account of such month from such reletting” if defendants are in default by failing to pay rent. The plain language of these provisions demonstrates that plaintiffs are entitled to all expenses incurred in their efforts to re-lease the premises. Further, plaintiffs are entitled to receive any difference between the monthly amount of rent defendants owed under the lease, less the actual amount of rent plaintiffs received from their new tenant(s) after re-leasing the premises.

The record reflects that plaintiffs made efforts to mitigate their damages, seeking to re-lease the vacated premises beginning in May 2017. The trial court, however, reasoned that it need not address the issue of mitigation because, absent an acceleration clause in the lease, plaintiffs were not entitled to posteviction rent damages. As we have already explained, this was a legal error. On remand, the court must determine whether plaintiffs have actually mitigated their damages. Plaintiffs “must make every reasonable effort to minimize the damages suffered[.]” *Goodwin, Inc v Coe*, 62 Mich App 405, 407; 233 NW2d 598 (1975) (quotation marks omitted), but the defendants bear the burden of demonstrating that plaintiffs have “not used every reasonable effort within [their] power . . . to minimize [their] damages.” *Id.*

Plaintiffs further assert that they are entitled to late fees of \$25.00 per day for any rent that is received after the due date, administrative fees of \$100.00 on any sum not paid within five days after the sum is due, and 18% interest per annum on any amount defendants failed to pay when due under the lease. We agree.

Paragraph 10(a) of the lease concerns late fees and states:

Tenant will be charged an additional amount of \$25.00 U.S. currency per day for any Rent that is received after the due date. Such late charge will be known as

“Additional Rent” and will be immediately billed to Tenant due and payable to Landlord upon presentation of such bill.

Paragraph 25 of the lease provides for interest and administrative fees, and states:

[A]ny amount not paid by Tenant when due under this Lease shall bear interest until paid at the lesser of (a) 18% per annum and (b) the maximum rate allowed by law. In addition to late fees, Landlord shall have the right to charge an administration fee of \$100.00 on any sum not paid within (5) days after due, to reimburse Landlord for the expense and burdens associated with collection. Neither the imposition nor collection of interest and/or late payment fees shall prevent Landlord from exercising its rights and remedies upon Tenant’s default under this Lease.

The trial court awarded plaintiffs with a total of (1) \$12,125.00 in late fees under paragraph 10(a) of the lease, (2) \$1,600.00 in administrative fees under paragraph 25 of the lease, and (3) \$7,362.00 for 18% interest on the unpaid amount due under paragraph 25 of the lease, reflecting amounts due from January 2016 through April 2017. The parties do not dispute the propriety of the trial court ordering defendants to pay late fees, administrative fees, and 18% interest from January 2016, when defendants began to pay less than the monthly amount of the rent due under the lease, to April 2017, when defendants vacated the premises. As we have already discussed, under paragraphs 27 and 49 of the lease, plaintiffs are entitled to posteviction damages from defendants subject to plaintiffs’ proper mitigation. Likewise, a plain reading of paragraphs 10(a) and 25 indicate plaintiffs are entitled to late fees, administrative fees, and 18% interest from defendants after their eviction. Again, the amounts plaintiffs are entitled to is subject to their proper mitigation because plaintiffs are not “entitled to be placed in a better position than [they] would have been if the contract had not been broken.” *Parment Homes, Inc v Republic Ins Co*, 111 Mich App 140, 150-151; 314 NW2d 453 (1981).

We also note that paragraphs 27 and 46 indicate plaintiffs are entitled to the attorney fees and expenses incurred in the district court proceedings. Likewise, plaintiffs are entitled to any posteviction attorney fees and expenses incurred, including those incurred during the instant proceedings. And, under paragraph 27 of the lease, if plaintiffs incurred posteviction expenses in reletting the premises, they are entitled to those as well.

Finally, to the extent that defendants argue that plaintiffs’ successful summary proceeding to recover possession ended the parties’ landlord-tenant relationship, thereby terminating plaintiffs’ entitlement to posteviction damages, we disagree. Defendants’ argument does not comport with Michigan law.

MCL 600.5750 governs summary eviction proceedings:

The remedy provided by summary proceedings is in addition to, and not exclusive of, other remedies, either legal, equitable or statutory. A judgment for possession under this chapter does not merge or bar any other claim for relief, except that a judgment for possession after forfeiture of an executory contract for the purchase of premises shall merge and bar any claim for money payments due or in arrears under the contract at the time of trial and that a judgment for possession after

forfeiture of such an executory contract which results in the issuance of a writ of restitution shall also bar any claim for money payments which would have become due under the contract subsequent to the time of issuance of the writ.^[4] The plaintiff obtaining a judgment for possession of any premises under this chapter is entitled to a civil action against the defendant for damages from the time of forcible entry or detainer, or trespass, or of the notice of forfeiture, notice to quit or demand for possession, as the case may be.

As our Supreme Court has explained “the Legislature took summary eviction cases outside the realm of the normal rules concerning merger and bar of related claims in order that attorneys would not be obligated to fasten all other pending claims to the swiftly moving summary proceedings.” *1300 LaFayette E Coop, Inc v Savoy*, 284 Mich App 522, 529-530; 773 NW2d 57 (2009) (alterations and quotation marks omitted). Thus, plaintiffs’ decision to institute summary eviction proceedings did not preclude their motion for entry of default judgment to recover posteviction rent damages.

In sum, we conclude that the trial court misapplied the law when it determined the damages to be awarded. Accordingly, we reverse the trial court’s default judgment to the extent that it determined that plaintiffs were not entitled to posteviction damages, and we remand for a determination of posteviction damages and mitigation consistent with this opinion.⁵

We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Anica Letica
/s/ James Robert Redford

⁴ The two exceptions identified in MCL 600.5750 are not applicable in this case.

⁵ Plaintiffs request that the damages awarded under the lease include those incurred through December 2018. Although that is when the judgment was entered, the trial court held its hearing on damages in June 2018. Thus, from June through December, the trial court had no evidence before it regarding plaintiffs’ subsequently incurred damages or their mitigation efforts. Accordingly, the trial court’s posteviction damage award must be determined from the evidence presented at its June hearing.