# STATE OF MICHIGAN

# COURT OF APPEALS

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| INDIANA LUMBERMEN'S MUTUAL INSURANCE COMPANY and KHOURY, INC., | UNPUBLISHED December 4, 2012 |
| Plaintiffs/Counterdefendants-Appellants, | |
| v | No. 307174 Dickinson Circuit Court |
| UNITED KISER SERVICES, LLC, | LC No. 10-016013-CK |
| Defendant/Counterplaintiff-Appellee. | |

Before: JANSEN, P.J., and STEPHENS and RIORDAN, JJ.

PER CURIAM.

Plaintiffs appeal by right an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) (no genuine issue of material fact). The trial court dismissed plaintiffs' complaint, finding that a lease agreement prohibited plaintiffs' claims against defendant, and dismissed defendant's counterclaim as moot. We affirm.

Plaintiff Khoury, Inc. (Khoury) was a Michigan corporation that leased space in a building located at 1001 Stephenson Street in Norway, Michigan. Two leases are involved—a three-month lease whose term began on September 1, 2006, and a twelve-month amended lease whose term began on July 1, 2007. The leases identified Stephenson Street Properties (SSP) as landlord. SSP was an unincorporated division of defendant. Khoury used the space "for a variety of purposes including performing finishing work and storage of business personal property to be offered for sale." Both leases provided that the landlord was responsible for maintaining the building in good repair, including keeping the plumbing in good condition. The leases also provided that Khoury was responsible to insure the building's contents, and the landlord was responsible for insuring the building. The insurance clause further provided:

> Tenant shall indemnify Landlord and keep Landlord harmless from any liability or claim for damages that may be asserted against Landlord because of any accident or casualty occurring on or about the premises. . . . Any insurance maintained by either party pursuant to this paragraph shall contain a clause or endorsement under which the insurer waives all rights of subrogation against the

other party or its agents or employees with respect to losses payable under the policy. . . .

On January 19, 2009, fire suppression system pipes burst in the building, causing water damage to Khoury's property. Plaintiff Indiana Lumbermen's Mutual Insurance (ILM) insured the loss and paid Khoury $170,157; Khoury had uninsured losses of $39,615. Plaintiffs filed suit (ILM as subrogree of Khoury), alleging breach of contract, negligence, breach of covenant of mutual enjoyment. Defendant moved for summary disposition, arguing that plaintiffs' claims were barred by the lease agreement. The trial court determined that because defendant and SSP were the same entity, the terms of the lease prohibited Khoury lawsuit.

We review de novo a circuit court's ruling on a motion for summary disposition. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 52; 684 NW2d 320 (2004). When reviewing a motion brought under MCR 2.116(C)(10), a court considers the affidavits, depositions, pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the non-moving party. *Rose v Nat'l Auction Group, Inc*, 466 Mich 453, 461; 646 NW2d 455 (2002). 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.*

The trial court found that the indemnity and waiver-of-subrogation clauses of a lease applied, but did not specify whether the lease referred to was the September 2006 lease or the July 2007 amended lease. Plaintiffs assert that the terms of the September 2006 lease should not apply to the instant dispute because the lease had expired. The September 2006 lease specified that its duration was for a period of three months followed by a holding over period consisting of a month-to-month tenancy that could extend up to two years from the time the lease was signed. Therefore, the terms of the September 1, 2006, lease did not apply at the time of the property damage.

Plaintiffs also argue that the July 2007 amended lease did not establish a new leasing period. The July 2007 amended lease was mostly identical to the September 2006 lease. However, the July 2007 amended lease changed the amount of space leased and the amount of rent due. Further, the July 2007 amended lease provided that its duration was for a period of 12 months followed by a holding over period of month-to-month tenancy that could extend up to two years from the time the lease was signed.

Plaintiffs argue that the holding over provision in the amended lease could only be applied to the period of time extending from the end of the September 2006 lease because the term clause in the July 2007 amended lease provided that "[t]he terms on the original lease still stand as previously agreed upon." In other words, plaintiffs argue that the amended lease only modified the length, space, and price of the lease without affecting any other provision of the September 2006 lease, including the holding over period of up to two years from the date the September 2006 lease was signed. Plaintiffs cite the deposition testimony of Jeffrey Tushoski, Khoury's plant manager, who signed the leases for Khoury. Tushoski answered affirmatively when asked whether the terms of the tenancy were under the "former lease." However, it was not clear whether the "former lease" he was speaking of was the July 2007 amended lease or the September 2006 lease. That Tushoski thought that Khoury was a month-to-month tenant even

after the holding over provision of the September 2006 lease would have expired in September 2008 suggests the "former lease" he was referring to was the July 2007 amended lease.

Plaintiffs argue that the language of paragraph four—that the terms of "the original lease still stand as previously agreed upon"—requires enforcement of the dates of the holding over period of the September 2006 lease.[1] However, it is not clear that "the original lease" referenced in the July 2007 amended lease is the September 2006 lease. The September 2006 lease included the same reference to "the original lease" (likely boilerplate).

Moreover, the terms of the September 2006 lease could not be enforced because they were incompatible with the July 2007 amended lease. The plain language of the amended lease evidenced an intent to alter the time that the leasing terms would apply. The July 2007 amended lease provided that the tenant would holdover as a month-to-month tenant for up to two years from the date the lease was signed. The holding over period was to begin at the time the lease expired without signing a new lease. At the time the July 2007 amended lease was signed, the September 2006 lease had expired. Therefore, the holding over clause of the July 2007 amended lease was referring to the expiration of the new lease because it could not have been referring to the expiration of a lease that had already expired. Thus, the terms of the holding over provision of the July 2007 amended lease were applicable at the time of the damage to Khoury's property in January 2009.

Plaintiffs argue that the trial court erred in finding that the provisions of the lease applied to both defendant and SSP because they were the same entity. A lease is a conveyance of a portion of property by the property owner to another for a term for valuable consideration. *De Bruyn Produce Co v Romero*, 202 Mich App 92, 98-99; 508 NW2d 150 (1993). The principles of contract interpretation apply to the interpretation of a lease, because the lease is a contract as well as a conveyance. See *Sprik v Regents of Univ of Michigan*, 43 Mich App 178, 186; 204 NW2d 62 (1972).

The primary goal in the interpretation of a contract is to effectuate the intent of the parties. *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 714; 706 NW2d 426 (2005). In other words, a court must determine the parties' agreement and enforce it. *G & A Inc v Nahra*, 204 Mich App 329, 330; 514 NW2d 255 (1994). Construction of the contract is a question of law for the court where contractual language is clear. *Meagher v Wayne State Univ*, 222 Mich App 700, 721; 565 NW2d 401 (1997). An unambiguous contract reflects the parties' intent as a matter of law and courts must enforce an unambiguous contract as written. *Hastings Mut Ins Co v Safety King, Inc*, 286 Mich App 287, 292; 778 NW2d 275 (2009). A provision in a contract is ambiguous if it irreconcilably conflicts with another provision, or when it is equally susceptible to more than a single meaning. *Royal Prop Group, LLC*, 267 Mich App at 714. A court will not create an ambiguity when the terms of the contract are clear. *Grosse Pointe Park v Michigan Muni Liability & Prop Pool*, 473 Mich 188, 198; 702 NW2d 106 (2005). Indemnity

[1] The September 2006 lease contained identical language even though no prior lease between the parties existed.

contracts should be interpreted to give effect to the intentions of the parties, but are construed against their author. *Sherman v DeMaria Bldg Co, Inc*, 203 Mich App 593, 596; 513 NW2d 187 (1994).

Both the September 2006 lease and the July 2007 amended lease explicitly identified SSP as the landlord. Neither lease names nor in any way identifies defendant. Plaintiffs argue that the trial court erred by considering deposition testimony and concluding, contrary to the express language of the lease, that "the record was clear that Khoury knew that . . . its landlord was not [SSP] but [defendant]." Generally, extrinsic evidence is not considered absent finding an ambiguity in the contract. *Grosse Pointe Park*, 473 Mich at 198. Here, there was no patent ambiguity and there was no finding of ambiguity in the contract by the court. The plain language of the lease indicates, as the trial court acknowledged, that SSP was the named landlord that contracted with Khoury.

However, extrinsic evidence may be considered to prove an ambiguity exists and to clarify the meaning of an ambiguous contract. *Meagher*, 222 Mich App at 722. A latent ambiguity "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*, 473 Mich at 198. Here, while applying the terms of the lease following the damage to Khoury's property, an issue emerged regarding whether the named landlord was the same entity as defendant. The answer to this question was not evident in the lease. Therefore, a latent ambiguity existed and the trial court was permitted to consider extrinsic evidence.

Plaintiffs argue that there existed a genuine issue of material fact concerning whether defendant and SSP were the same entity because Khoury paid rent to SSP, insurance documents mentioned SSP as landlord, and some of defendant's other leases named defendant and SSP as landlords. The trial court relied on deposition testimony to find that Khoury knew that its landlord was defendant. Tushoski, who was involved in negotiating the lease of September 1, 2006, believed he was dealing with defendant's representatives. Tushoski met initially with Jeff Kiser, defendant's vice president of operations. David Chartier, Khoury's supervisor of departments, spoke with Bill Harris, defendant's owner, before informing Tushoski that he believed the building was adequate for Khoury to lease. Chartier stated that he knew it was defendant's building that Khoury was leasing, and SSP was not mentioned during the process of identifying the building Khoury wished to lease. Additionally, three of defendant's employees stated that SSP was the same entity as defendant, and the SSP banking account identified it as a division of defendant.

Plaintiffs additionally argue that defendant should not have been considered a third-party beneficiary to the lease because it was not specifically named in the lease.[2] However, defendant does not assert that it had third-party beneficiary status. Defendant argues that because SSP was

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[2] An entity is a third-party beneficiary of a contract only where the contract identifies "that a promisor has undertaken a promise directly to or for that person." *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 427-428; 670 NW2d 651 (2003); see also MCL 600.1405.

an unincorporated division of defendant, SSP and defendant were the same entity because an unincorporated division is not a legally separate entity capable of independent action. Plaintiffs concede that it is "well-established law that a division is not a separate legal entity from its parent corporation."

Given the evidence of record, we see no error in the court's finding that SSP and defendant were the same entity for purposes of the lease.

Plaintiffs next argue that through e-mails, the parties formed a new lease that was in effect at the time of the loss and which did not contain an indemnity or waiver-of-subrogation clause. The trial court found that the e-mails were merely a reduction in the amount of space leased. In the event that a tenant holds over, "the law implies a continuance of the tenancy on the same terms and subject to the same conditions." *Bay Co v Northeastern Michigan Fair Ass'n*, 296 Mich 634, 640-641; 296 NW 707 (1941). The terms of a holdover tenant may be determined by inquiring into the terms of the original lease. *Glocksine v Malleck*, 372 Mich 115, 120-121; 125 NW2d 298 (1963).

However, parties to a contract are free to change their agreement or form a new agreement that completely supersedes the terms of the original. *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 412-413; 646 NW2d 170 (2002). In *Omnicom of Michigan v Giannetti Investment Co*, 221 Mich App 341, 347; 561 NW2d 138 (1997), the court enunciated the following principals for considering consecutive contracts:

> If parties to a prior agreement enter into a subsequent contract that completely covers the same subject, but the second agreement contains terms that are inconsistent with those of the prior agreement, and the two documents cannot stand together, the later document supersedes and rescinds the earlier agreement.

Plaintiffs assert that the e-mails exchanged between Tushoski and defendant's employees between August and December 2008 constituted a new lease because they evidenced a "meeting of minds" concerning the identification of the leased area on specified terms for an indefinite period. The five e-mails discuss the amount of space Khoury required and the rent due for the area of space required. The e-mails also contain two requests to move a wall to reduce the space rented. Tushoski testified that the e-mails addressed Khoury's decreased need and the reduction of rental space.

The e-mails do not form a new lease because they do not meet the requirements of a lease. In order for an agreement to be a valid lease, it must contain the names of the parties, an adequate description of the leased premises, the length of the lease term, and the amount of the rent. *De Bruyn Produce Co v Romero*, 202 Mich App 92, 98-99; 508 NW2d 150 (1993). The rent and description of the leased area were not adequate in the e-mails as they were uncertain. The e-mails did not discuss the location of the leased space, and the amount of rent and the amount of space leased changed in each different e-mail. Further, there was no agreement evident regarding the length of a new lease. In any event, in an e-mail of October 31, 2008, an employee of defendant indicated that Khoury was leasing space on a month-to-month basis, which was consistent with the holdover clause of the July 2007 amended lease.

The terms of the holdover clause of the July 2007 were operational at the time water damaged Khoury's property. Therefore, the trial court did not err in finding that plaintiffs' claims against defendant were precluded by operation of the indemnity and waiver-of-subrogation clauses of the July 2007 amended lease.

The trial court did not err in finding that the terms of the July 2007 lease were applicable to bar the instant dispute.

Affirmed.

/s/ Kathleen Jansen
/s/ Cynthia Diane Stephens
/s/ Michael J. Riordan