STATE OF MICHIGAN

COURT OF APPEALS

CREATIVE DENTAL CONCEPTS, L.L.C., Plaintiff-Appellant,	UNPUBLISHED June 26, 2014
V	No. 315117 Oakland Circuit Court
KEEGO HARBOR DEVELOPMENT, L.L.C., Defendant-Appellee.	LC No. 2012-126273-NZ

Before: DONOFRIO, P.J., and GLEICHER and M.J. KELLY, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(7) and (C)(10) regarding plaintiff's action alleging negligence arising from damage to personal property at a leased premises. We affirm.

I. BASIC FACTS

Plaintiff manufactures specialty patented dental products. Defendant is a commercial real estate rental company. On March 19, 2009, the parties entered into a lease, where plaintiff would occupy defendant's commercial building at 2140 Beechmont Street in Keego Harbor, Michigan. Plaintiff used the premises for manufacturing and warehousing.

Section 14 of the lease provided as follows:

> 14. **Insurance.** Tenant must maintain in effect a commercial general liability insurance policy providing coverage for the Premises, including without limitation all common areas, with policy limits of not less than **$100,000.00** per person and **$100,000.00** per occurrence, exclusive of defense costs and without any provision for a deductible or self-insured retention.
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> Tenant must maintain in effect a property insurance policy on a special cause of loss form covering Tenant's personal property, trade fixtures, and improvements to their full replacement cost, without deduction for depreciation. The insurance must include coverage for loss of profits or business income and reimbursement for extra expenses incurred as the result of damage or destruction to all or a part of the Premises.

> All insurance policies that Tenant is required to maintain must be written by carriers who are authorized to write insurance in Michigan and have an AM Best Company rating of not less than A-VIII. Any commercial general liability policy that Tenant is required to maintain will (a) name Landlord as an additional named insured, (b) be endorsed to provide that they will not be canceled or materially changed for any reason except on 30 days' prior notice to Landlord, and (c) provide coverage to Landlord whether or not the event giving rise to the claim is alleged to have been caused in whole or in part by the acts, omissions, or negligence of Landlord. Landlord and Tenant will require their property insurance policies to include a clause or an endorsement allowing Landlord and Tenant to release each other from any liability to each other or anyone claiming through or under them, by way of subrogation or otherwise, for any loss resulting from risks insured against. If any policy that Tenant is required to maintain is written on a claims-made insurance form, each policy must have a retroactive date that is not later than the Commencement Date. Furthermore, if insurance coverage is written on a claims-made basis, Tenant's obligation to provide insurance will be extended for an additional period equal to the statute of limitations for such claims on the Termination Date, plus one year. Insurance may be provided in the form of blanket insurance policies covering properties in addition to the Premises or entities in addition to Tenant. All blanket policies must provide that the overall aggregate limit of liability that applies to Landlord or the Premises is independent from any overall or annual aggregate that applies to other entities or properties.
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> At Landlord's option, Tenant must deliver either certificates of insurance or the original policies to Landlord before the Commencement Date, together with receipts evidencing payment of the premiums. Tenant must deliver certificates of renewal for the policies to Landlord not less than 30 days before their expiration dates.
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> This Lease requires Tenant to obtain insurance to cover any claim for loss resulting from fire or other casualty. Landlord and Tenant will each look to its own insurance for the recovery of insured claims. Landlord and Tenant release one another from insured claims. Landlord and Tenant waive any right of recovery of insured claims by anyone claiming through them, by way of subrogation or otherwise, including their respective insurers. This release and waiver remains effective despite either party's failure to obtain insurance in accord with this Lease. *If either party fails to obtain insurance, it bears the full risk of its own loss.* [Italics added.]

Plaintiff purchased a commercial insurance policy from Selective Insurance Company of South Carolina for the period March 1, 2010, to March 1, 2011. However, Selective Insurance Company cancelled the policy in or around November 2010, after plaintiff failed to pay some portion of the premium.

On December 31, 2010, plaintiff's representative was present at the Beechmont Street building when water cascaded in from the ceiling, resulting in damage to plaintiff's property,

including plaintiff's machines, molds, and product. The evidence submitted suggests that a prior tenant had removed part of a roof-support truss that compromised part of the roof's ability to withstand the weight of snow and ice, which led to the leak. Plaintiff claims that it first became aware of the cancellation of the insurance policy sometime after the December 31, 2010, roof leak. Consequently, plaintiff never made an insurance claim for its property damage.

Plaintiff filed the present lawsuit, alleging negligence. Plaintiff claims that it suffered significant personal property damages as the result of defendant's breach of duties concerning maintenance, inspection, and repair of the roof. Defendant moved for summary disposition pursuant to MCR 2.116(C)(7) and (C)(10), arguing, in pertinent part, that the release in Section 14 of the lease required dismissal as a matter of law. The trial court agreed and granted the motion.

II. ANALYSIS

On appeal, plaintiff argues that the trial court erred in granting summary disposition to defendant. We disagree.

A.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012). Pursuant to MCR 2.116(C)(7), summary disposition may be granted to a defendant, among other things, "because of release." In reviewing a motion under MCR 2.116(C)(7), a court must accept "[t]he contents of the complaint . . . as true unless contradicted by documentation submitted by the movant." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party. *Id*.

Issues concerning proper interpretation of contracts are questions of law, which also are reviewed de novo on appeal. *In re Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008). The primary goal in the interpretation of a contract is to honor the intent of the parties, *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 473; 663 NW2d 447 (2003), and when presented with a dispute, a court must determine what the parties' agreement is and enforce it, *Shefman v Auto Owners Ins Co*, 262 Mich App 631, 637; 687 NW2d 300 (2004). Contractual language is to be given its ordinary and plain meaning, and technical and constrained constructions should be avoided. *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 367; 817 NW2d 504 (2012); *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001).

B.

Reading lease Section 14 as a whole establishes that summary disposition was proper. The plain, unambiguous language of Section 14 bars plaintiff's claims. It is undisputed that plaintiff failed to maintain the required insurance at the time of the alleged loss. Section 14 of the lease provides that "[i]f either party fails to obtain insurance, it bears the full risk of its own loss." Plaintiff argues that this language must be read to pertain only to risks that would have

been covered had it been carrying the required insurance. But this is reading more into the plain language than it says. One of the obvious purposes of the release is to avoid the wild speculation that necessarily would result if plaintiff's view was correct. Under plaintiff's view, if a tenant did not carry insurance, as required by the lease, and suffers a loss, the parties would be forced to speculate whether that loss would have (or would not have) constituted an "insured claim" if the tenant had this mythical insurance. Given the infinite possibilities in the various insurance policies available, such an exercise would be virtually impossible. In short, the parties agreed that plaintiff would maintain insurance, and if it did not, it did so at its own risk and could not then sue defendant for personal property loss. Our interpretation is further buttressed by Section 14's unequivocal waiver of subrogation rights. Both parties' waiver of that right is consistent with the overriding intent that the parties are responsible for their own losses and must look solely to their own insurance for any recovery.

Plaintiff's reliance on Section 12 of the lease, dealing with indemnification, is misplaced. That section provides as follows:

> 12. **Indemnification.** Tenant will indemnify and defend Landlord against all claims of bodily injury or property damage relating to the Premises. We will indemnify landlord when written notice is given by landlord to [plaintiff]. The claims covered by this indemnification include all claims for bodily injury or property damage relating to (a) the condition of the Premises; (b) the use or misuse of the Premises by Tenant or its agents, contractors, or invitees; or (c) any event on or within the Premises, whatever the cause. Tenant's indemnification does not extend to liability for damages resulting from the sole or gross negligence of Landlord or from Landlord's intentional misconduct.

Plaintiff argues that this section unambiguously reserved claims for property damage resulting from defendant's sole or gross negligence, which conflicts with the Section 14 release. However, a careful reading reveals that this is not the case. Instead, this section merely provides that plaintiff will not *indemnify* defendant "for damages resulting from the sole or gross negligence" or the intentional misconduct of defendant. There is no conflict between this and Section 14 because Section 14 releases the claim, and therefore, in a case like the present, the question of whether defendant is entitled to indemnification never materializes.

Plaintiff's additional argument that it did not "materially breach" the lease also lacks merit. Plaintiff erroneously relies on the lease remedy provisions contained in Section 19. In that section, it defines certain conduct that constitutes a "Breach, a "Habitual Economic Breach," a "Prolonged Uncured Breach," and a "Material Breach." Under the terms of the lease, defendant could terminate the lease only on the occurrence of a "material" breach. Thus, while it is not disputed that not carrying insurance did not fall under the lease's definition of "Material Breach," all that means is that defendant could not have terminated the lease on this basis. This is irrelevant since defendant was attempting to enforce the lease, not terminate it. Likewise, we note that plaintiff's reliance on the fact that a material breach is necessary in order to invoke the equitable remedy of rescission, see *Omnicom of Mich v Giannetti Inv Co*, 221 Mich App 341, 348; 561 NW2d 138 (1997) ("In order to warrant rescission of a contract, there must be a

material breach affecting a substantial or essential part of the contract."), is also inapplicable.

Affirmed. Defendant, as the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Pat M. Donofrio
/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly