STATE OF MICHIGAN

COURT OF APPEALS

DETROIT RESCUE MISSION MINISTRIES, Plaintiff-Appellee,	UNPUBLISHED September 22, 2011
v KENNETH MOORE, Defendant,	No. 296554 Wayne Circuit Court LC No. 08-125826-CZ
and RESIDENTIAL HOME CARE, INC., a/k/a RESIDENTIAL HOME SERVICES, Defendant-Appellant.	

Before: SAAD, P.J., and JANSEN and K. F. KELLY, JJ.

PER CURIAM.

Defendant Residential Home Care, Inc. (defendant) appeals the circuit court's order granting summary disposition in favor of plaintiff. For the reasons set forth below, we reverse and remand for entry of judgment in favor of defendant.

I

Defendant occupied office space in a building that was purchased by plaintiff. Defendant rented the space under a lease agreement effective November 1, 2000, through October 31, 2002. Despite the 2002 expiration of the lease, defendant remained on the property and continued to pay $806 a month in rent. The lease agreement contained a holdover provision stating that defendant would pay plaintiff 150 percent of the daily base rent for each day defendant remained on the property after the expiration of the lease, or, at plaintiff's discretion, the holdover would be considered a month-to-month extension of the lease. Defendant moved into a new suite on the property in 2005, but the parties did not execute a new lease and defendant continued to pay $806 each month. In February 2006, the building manager sent out a letter stating that all tenants were operating under month-to-month leases and that plaintiff had increased the amount of rent to $16 per square foot per year. For defendant, this represented an increase from $806 a month

to $2,249 a month. Notwithstanding this notice, defendant continued to pay plaintiff $806 a month from April 2006 through May 2008, and plaintiff continued to cash the checks.

In June 2008, plaintiff filed a complaint in the district court for nonpayment of rent. The court entered a stipulated order awarding plaintiff possession of the property. The court also removed plaintiff's supplemental claim for money damages to the circuit court. Plaintiff and defendant filed motions for summary disposition, and the circuit court granted summary disposition in favor of plaintiff. Specifically, the circuit court ordered defendant to pay back rent from October 31, 2002, to July 3, 2008, totaling $27,404.

II

A

Defendant argues that plaintiff cannot recover under the holdover provision of the lease agreement because plaintiff did not properly plead the claim under MCR 2.111. While we agree that plaintiff did not seek unpaid rent for the period prior to April 2006, we find that the circuit court properly considered the holdover provision of the parties' lease when addressing plaintiff's claim.

Contrary to plaintiff's argument, merely raising an issue in a motion for summary disposition does not render the issue "tried by consent" under MCL 2.118(C)(1).[1] *Amburgey v Sauder*, 238 Mich App 228, 247-248; 605 NW2d 84 (1999). And the fact that the parties argued about the holdover clause is not dispositive of whether the issue was properly pleaded. However, we note that plaintiff's complaint for "non-payment of rent, Landlord-Tenant" referred to the disputed property, stated that a copy of the lease was attached to the complaint, and stated that the rental rate was $2,249 a month. The complaint further provided that plaintiff was seeking total rent due in the amount of $42,185, plus $2,249 per month in additional rent "until judgment, plus costs." In other words, the complaint adequately informed defendant of the specific amount of rent sought and further informed defendant that the parties' lease agreement, which contained the holdover clause, was the basis for the claim. This gave sufficient notice of the nature of the claim to permit defendant to take a responsive position. *Dalley v Dykema Gossett, PLLC*, 287 Mich App 296, 305; 788 NW2d 679 (2010).

B

We agree with defendant that plaintiff expressly waived the collection of any holdover rent prior to April 2006. Paragraph 18(b) of the lease, entitled "Holdover," provided:

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[1] MCL 2.118(C)(1) states that "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they are treated as if they had been raised by the pleadings. In that case, amendment of the pleadings to conform to the evidence and to raise those issues may be made on motion of a party at any time, even after judgment."

> Tenant shall pay Landlord for each day Tenant retains possession of the Premises or any part thereof after termination hereof, by lapse of time or otherwise, at the Holdover Percentage of one and one-half (1½) times the daily Base Rent for the last period prior to the date of such termination, and shall also pay all damages sustained by Landlord by reason of such retention, or, if Landlord gives written notice to Tenant of Landlord's election thereof, such holding over shall constitute an extension of this Lease for a period from month-to-month, on the terms and conditions of this Lease. This provision shall not be deemed to waive Landlord's right of re-entry or any other right hereunder or at law.[2]

Paragraph 19(e) of the lease, entitled "No Waivers by Implication," provided:

> No waiver of any default of Tenant hereunder shall be implied from any omission by Landlord to take any action on account of such default if such default persists or be repeated, and no express waiver shall affect any default other than the default specified in the express waiver and that only for the time and to extent therein stated.

"A lease is a contract as well as a conveyance, and ordinary rules of contract interpretation apply." *Sprik v Univ of Mich Bd of Regents*, 43 Mich App 178, 193; 204 NW2d 62 (1972). "A contract must be interpreted according to its plain and ordinary meaning." *Alpha Capital Mgt, Inc v Rentenbach*, 287 Mich App 589, 611; 792 NW2d 344 (2010).

Defendant claims that it had an oral agreement with plaintiff to rent the new space for $806 a month and an oral agreement to continue the rental rate of $806 a month after the lease expired on October 31, 2002. In support of its motion for summary disposition, plaintiff argued that "the parties had a month-to-month tenancy in operation. The tenancy itself renewed every 30 day[s] when defendant made *a full rental payment* and applied it to the ledger." (Emphasis added.) Plaintiff further argued that "plaintiff had not increased the rental rate on the commercial property since the written lease expired." Plaintiff's motion for summary disposition included an accounting ledger showing no rent owing prior to March 2006, and seeking rent in the amount of $2,249 a month beginning in April 2006. Moreover, the letter of

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[2] In general, absent a holdover provision, "when a tenant under a valid lease for years holds over, the law implies a contract to renew the tenancy on the same terms for another year." *Wagner v Regency Inn Corp*, 186 Mich App 158, 168; 463 NW2d 450 (1990). Indeed, "'[w]here there is no express agreement for a renewal of an annual lease and the tenant remains in possession after the term has expired, the landlord may treat him as a trespasser or may acquiesce in his continuing in possession, and in the latter event the law presumes that the tenant holds for another year subject to the terms of the previous lease.'" *Kokalis v Whitehurst*, 334 Mich 477, 481; 54 NW2d 628 (1952) (citation omitted). Here, the lease specifically addressed the event of a holdover, specifying that the rent would be increased unless the landlord expressly authorized the tenant to remain on a month-to month basis under the terms of the lease.

February 23, 2006, confirms that plaintiff considered the tenants of the property to be operating under a month-to-month tenancy, with no increase in rent. The letter, which announced a rent increase as of March 1, 2006, stated in relevant part that "[a]ll tenants at 211 Glendale are operating on expired leases on *a month-to-month basis*. Most are paying a monthly rent based on the last year of the expired lease (2003 or earlier) and *no increase in rent has been charged for several years*." (Emphasis added.) Thus, by plaintiff's own words, it is clear that plaintiff allowed defendant to continue the lease on a month-to-month basis under its original terms. As defendant also points out, the complaint and motion for summary disposition indicated that plaintiff was not seeking past due rent for any time prior to April 2006. We conclude that it was beyond genuine factual dispute that the rent due prior to April 2006[3] was $806 a month. The circuit court therefore erred by ruling that defendant owed any additional rent for the time period prior to April 2006.

C

We also conclude that the circuit court erred by awarding plaintiff past-due rent after April 2006 at the increased holdover rate specified in the parties' lease. The evidence in this case made clear that plaintiff was not entitled to charge defendant rent in excess of $806 a month after April 2006. It is undisputed that defendant moved onto a new suite in 2005. A lease agreement must be definite with respect to its description of the leased premises. *Bushman v Faltis*, 184 Mich 172, 179; 150 NW 848 (1915); see also *Macke Laundry Service Co v Overgaard*, 173 Mich App 250, 254; 433 NW2d 813 (1988). We may not enforce a contract to lease one unit when we have before us in evidence only a contract to lease an entirely different unit. See *Executive Towers v Leonard*, 7 Ariz App 331, 333; 439 P2d 303 (1968). Once defendant moved into the new suite in 2005, the original lease agreement ceased to control and its holdover provision was therefore of no effect with regard to defendant's occupancy of the new space. Moreover, we note that even after April 2006, plaintiff continued to accept defendant's monthly payments of $806. Plaintiff apparently did not even send notification that it considered defendant to be in arrears until August 2007. Given these facts, we conclude that plaintiff was not entitled to collect increased rent payments from defendant after April 2006 at the holdover rate contained in the original lease agreement.

III

The circuit court erred by determining that plaintiff was entitled to collect back rent from defendant and by granting summary disposition in favor of plaintiff. We reverse the grant of summary disposition in favor of plaintiff and remand this case to the circuit court for entry of judgment in favor of defendant consistent with this opinion.

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[3] Although the letter dated February 23, 2006, stated that plaintiff sought the increased rental rate as of March 2006, "an estate at will or by sufferance may be terminated by either party by giving 1 month's notice to the other party." MCL 554.134(1). Thus, the new rate could not take effect until April 2006, and in fact, plaintiff's ledger seems to indicate that the increased rent was not charged until April 2006.

In light of our conclusions in this case, we need not consider the remaining arguments raised by the parties on appeal.

Reversed and remanded for entry of judgment in favor of defendant consistent with this opinion. We do not retain jurisdiction. As the prevailing party, defendant may tax costs pursuant to MCR 7.219.

/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly

S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

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SAAD, P.J. (*concurring in part and dissenting in part).*

I concur with the majority's opinion in all but part II(C). I respectfully dissent from that part and would hold that plaintiff is entitled to at least some past due rent after April 2006 at the holdover rate specified in the lease. Though, in late 2005, defendant moved from a second-floor unit to Suite 309, defendant continued to also occupy the adjoining Suite 315, which is the space contemplated in the lease containing the holdover provision. Because the holdover provision states that the holdover rate applies if the tenant retains possession of the premises "or any part thereof," plaintiff is entitled to recover at the holdover rate from the time plaintiff sent notice that it sought to end the rental rate of $806 a month and charge the new, higher rate. In essence, plaintiff was ending the month-to-month tenancy, at which point defendant became a holdover tenant, subject to the holdover rate in the original lease. Further, Michigan case law does not state that plaintiff is barred from recovering rent because plaintiff cashed the checks for $806. Though, as the trial court acknowledged, unpublished opinions are not binding on this Court, it remains true that, as stated in *Popovski v New Jersey Enterprises, LLC*, unpublished opinion per curiam of the Court of Appeals, issued November 26, 2006 (Docket No. 262309), there is "no binding Michigan authority holding that a landlord is prohibited from collecting additional rent under the express terms of a holdover provision in a lease by accepting rent payments for less than the full amount due." *Id*. at 3. This issue is controlled by a clear holdover provision that is plainly applicable based on defendant's retained possession of at least a portion of the premises

as a holdover tenant. Accordingly, for the period after 2006, I would affirm the trial court's award of rent at the holdover rate specified in the lease.

/s/ Henry William Saad