STATE OF MICHIGAN

COURT OF APPEALS

ES & AR LEASING COMPANY, Plaintiff-Appellee, v THE STOLL COMPANIES, d/b/a SOUTHERN MICHIGAN NEWS DIVISION and UNITED MAGAZINE COMPANY, Defendant-Appellants.	UNPUBLISHED February 23, 2001 No. 214979 Oakland Circuit Court LC No. 97-550411-CK

ES & AR LEASING COMPANY, Plaintiff-Appellee, v THE STOLL COMPANIES, d/b/a SOUTHERN MICHIGAN NEWS DIVISION and UNITED MAGAZINE COMPANY, Defendant-Appellants.	No. 223677 Oakland Circuit Court LC No. 97-550411-CK

Before: Talbot, P.J., and O'Connell and Cooper, JJ.

PER CURIAM.

This is a consolidated appeal from the trial court's issuance of orders granting plaintiff's motion for final judgment and plaintiff's third motion for partial summary disposition pursuant to MCR 2.116(C)(10). We affirm.

Defendants' first issue on appeal is that the trial court erred when it denied the defendants' motion for change of venue. We disagree. A trial court's ruling in response to a motion to change improper venue is reviewed by this Court under the clearly erroneous standard. *Massey v Mandell*, 462 Mich 375, 379; 614 NW2d 70 (2000). Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id.*

Pursuant to MCR 2.223, if venue in a civil action is improper, the trial court shall order a change of venue on a timely motion of a defendant or on its own initiative. *Marsh v Walter L Couse & Co*, 179 Mich App 204, 207; 445 NW2d 204 (1989). "When a challenge to venue has been raised by a defendant under MCR 2.223, the burden is on the plaintiff to establish that the county he chose is a proper venue." *Id*. at 208. In this case, defendants argue that proper venue would be in Jackson County where the property was situated. Additionally, defendant Stoll claims only minimal contacts with Oakland County and that venue there would be inappropriate.

Defendants argue that the proper venue statute should be MCL 600.1605; MSA 27A.1605, which provides that venue for "recovery of real property, or of an estate or interests therein, or for the determination in any form of such right or interest" shall be in the county where the property is located. While this case deals with a leasehold, which is an interest in property, the subject of the action is the alleged breach of the lease agreement. See *Wentworth v Process Installations, Inc*, 122 Mich App 452, 464; 333 NW2d 78 (1983). In *Schiff Co v Peck Drug Stores, Inc*, 278 Mich 432; 270 NW2d 738 (1936), the Court ruled that, in a suit to cancel or modify a lease, venue was proper where the defendant had its offices because it involved a contractual right between the parties and not title to the property. Consequently, the real property venue statute is inapplicable and the general venue statute must be used.

The general venue statute, MCL 600.1621; MSA 27A.1621, provides in part:

> Except for actions provided for in sections 1605, 1611, 1615, and 1629, venue is determined as follows:
>
> (a) The county in which a defendant resides, has a place of business, or conducts business, or in which the registered office of a defendant corporation is located, is a proper county in which to commence and try an action.

Under this statute, defendants argue that Stoll did not have the necessary contact with Oakland County to warrant venue. However, ES & AR's complaint named both Stoll and United Magazine Company (Unimag) as defendants. Unimag admitted to conducting business in Oakland County. Pursuant to MCL 600.1621; MSA 27A.1621, if any one of the defendants satisfies the venue requirements, then venue is proper for all defendants. *Hunter v Doe*, 61 Mich App 465, 467; 233 NW2d 39 (1975). Therefore, we find that the trial court did not err in denying defendants' motion for a change of venue.

Defendants' next claim that the trial court's order granting partial summary disposition in favor of ES & AR was inappropriate because there remained genuine issues of material fact as to whether Stoll was constructively evicted and whether ES & AR materially breached the lease agreement by failing to repair and maintain the leased property. We disagree. A trial court's grant of summary disposition is reviewed de novo on appeal. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The trial court granted summary disposition pursuant to MCR 2.116(C)(10). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. *Id*. at 119-120. Where

the evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4); *Quinto v Cross & Peters Co*, 451 Mich 358; 547 NW2d 314 (1996). Furthermore, interpretation of contractual language is an issue of law that is reviewed de novo on appeal. *Morley v Automobile Club of Michigan*, 458 Mich 459, 465; 581 NW2d 237 (1998). Whether contractual language is ambiguous is also a question of law that is reviewed de novo. *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 353; 596 NW2d 190 (1999).

Defendants' contend that the trial court erred in granting summary disposition because genuine issues of material fact exist as to whether defendants were constructively evicted from the leased property. Defendants also contend that there existed a genuine issue of material fact as to whether Dial breached the Lease by failing to make repairs and maintain the leased property. We disagree with both assertions.

Michigan has long recognized the theory of constructive eviction. See *Grove v Youell*, 110 Mich 285, 291; 68 NW 132 (1896). Constructive eviction occurs "when the act of the landlord is of such a character as to deprive the tenant…of the beneficial use and enjoyment of the whole or any part of the demised property, to the extent he is thus deprived." *Bamlet Realty Co v Doff*, 183 Mich 694, 703; 150 NW 307 (1915). Constructive eviction can also be found where a landlord fails to supply essential services. See *Everson v Albert*, 261 Mich 182, 186; 246 NW 88 (1933).

In this case, defendants argue that Dial's failure to timely pay the utility bills, as required by the Lease, created uncertainty in the regular supply of electricity and thus caused a constructive eviction. There is no factual dispute that Dial stopped making payments on utility charges in January 1997, and that several shut off notices were given to Stoll. However, the power was never interrupted and Stoll suffered no disruption in its business production. Stoll's Chief Financial Officer, John Heiniger, testified that the disruptions caused by the threatened power disruption were managerial. Therefore, we find that although Dial breached its contractual obligation to pay utilities as they came due, this breach did not deprive Stoll of its beneficial use and enjoyment of the property and thus did not constitute a constructive eviction.

Defendants also argue that there was a genuine issue of fact as to whether Dial breached its duty to repair the leased property, thereby constituting a material breach of the Lease. We disagree. Pursuant to the Lease, Dial, after receiving written notice, was required to maintain and repair the roof and four outer walls of the leased property. During Stoll's occupation of the premises, the roof leaked and there was a heating problem. In response to Stoll's unwritten requests, Dial attempted to fix the roof and installed a hanging gas furnace in the ceiling. While there is testimony that the roof continued to leak, there is no evidence that Stoll gave Dial written notice of the leak as required by the Lease.

In *Omnicom v Giannetti Investment Co*, 221 Mich App 341, 348; 561 NW2d 138 (1997), this Court stated that "[i]n order to warrant rescission of a contract, there must be a material breach affecting a substantial or essential part of the contract. In determining whether a breach is material, the court should consider whether the nonbreaching party obtained the benefit it reasonably expected to receive." *Id*. (citations omitted). In this case, Stoll continued operations in the lease premises and appears not to have suffered any damages as a result of the repair and

maintenance problems. As such, we find that Stoll was not denied the benefit of the Lease that it reasonably expected to receive. Therefore, the trial court did not err when it determined that summary disposition in favor of ES & AR, pursuant to MCR 2.116(C)(10), was appropriate.

Defendants' next issue on appeal is that the trial court erred by ruling on ES & AR's motion for partial judgment. The motion was brought pursuant to MCR 2.116(B)(1). Stoll contends that the motion for partial judgment should have been a motion for partial summary disposition under MCR 2.116(C)(10). However, defendants failed to raise this issue in the trial court. Therefore, the issue is not properly preserved and we decline to address it. *Herald Co, Inc v Ann Arbor Public Schools*, 224 Mich App 266; 568 NW2d 411 (1997).

Defendants' next issue on appeal is that the trial court erred by failing to consider the costs saved by ES & AR, due to Stoll's termination of the Lease, in determining damages. We disagree. While defendants proffered past utility and maintenance bills to the judge, they offered nothing further regarding this issue. There was no testimony to explain how these bills could accurately project ES & AR's future savings on maintenance and utility usage. Moreover, it is impossible to determine if defendants would have continued to use the same amount of electricity, or even remained on the premises, for the duration of the lease. "[D]amages cannot be founded upon mere speculation and conjectural evidence." *Barry v Flint Fire Department*, 44 Mich App 602, 611; 205 NW2d 627 (1973).

Defendants' next issue on appeal is that the trial court erred when it awarded ES & AR damages that included late fees, as provided for by the Lease, and statutory prejudgment interest. We disagree. An award of interest pursuant to MCL 600.6013; MSA 27A. 6013, is reviewed de novo on appeal. *Beach v State Farm Mutual Automobile Ins Co*, 216 Mich App 612, 623-624; 550 NW2d 580 (1996).

Pursuant to the Lease in this case, a five-percent late charge was due as additional rent if the monthly rental payment was overdue by ten days. The trial court's order included in ES & AR's award of damages the late charges pursuant to the Lease. Additionally, the court ordered that ES & AR was entitled to statutory interest in the amount of 6.92 percent per annum that totaled $3,734.16. Defendants argue that it was inappropriate for the court to award both late fees and interest. We find no law to support defendants' position. The late fee awarded to ES & AR was part of the total damages awarded under the lease. The prejudgment interest was awarded pursuant to MCL 600.6013(6); MSA 27A.6013(6).

Defendants' last issue on appeal is that the trial court erred in denying defendants discovery prior to the court's ruling on ES & AR's third motion for summary disposition. We disagree. A trial court's decision whether to grant or deny discovery is reviewed for abuse of discretion. *Harrison v Olde Financial Corp*, 225 Mich App 601, 614; 572 NW2d 679 (1997). A trial court abuses its discretion when it denies discovery of relevant information. *Id.*

The trial court refused defendants' request for discovery due to defendants' failure to comply with the court's prior orders and because the trial court found the request was untimely. In this case, defendants did not request new discovery until ES & AR filed its third motion for partial summary disposition, over a year from the time that discovery was supposed to have

ended. Therefore, we find that the trial court did not abuse its discretion in denying defendants' request for discovery.

Affirmed.

/s/ Michael J. Talbot
/s/ Peter D. O'Connell
/s/ Jessica R. Cooper