STATE OF MICHIGAN

COURT OF APPEALS

NO-PINK, INC., d/b/a THE MUSIC MENU,

Plaintiff-Appellee,

v

JOHN A. ELLISON and LEO ELLISON,

Defendants,
Cross-Defendants, Appellants,

and

GREEKTOWN PROPERTY L.L.C.,

Defendant,
Cross-Plaintiff, Appellant.

UNPUBLISHED
February 27, 2001

No. 215457
Wayne Circuit Court
LC No. 97-705122-CH

Before: Markey, P.J., and Murphy and Collins, JJ.

PER CURIAM.

This case involves a property dispute between three parties. At issue is whether plaintiff-sublessee No-Pink, Inc. (No-Pink) had a vested right of first refusal that could defeat the landlord/owners' sale of a larger property, which included the leased property, to a third party. The trial court found that plaintiff did have such a right and granted summary disposition, pursuant to MCR 2.116(C)(10), in favor of plaintiff. Defendants now appeal as of right. We reverse.

Defendants Ellisons (the Ellisons) owned three connected buildings at the corner of Monroe and Beaubien streets in Detroit. On June 21, 1983, the Ellisons leased 511 Monroe to tenant New Delmar, Inc. (New Delmar) for a ten-year period, the lease including a five-year option. The lease also provided the tenant with a right of first refusal, stating as follows:

> (39) In the event Lessor obtains a purchaser for the Leasehold premises, Lessor shall first offer Lessee the right to purchase the premises, upon the same termination and conditions, and Lessee shall have thirty (30) days from the date of such offer to accept of reject.

On July 7, 1987, New Delmar subleased 511 Monroe to Lindos, Ltd. (Lindos). The sub-lease agreement contained the following provision on the right of first refusal:

> (39) In the event Lessor obtains a purchaser for the Leasehold premises and offers Sublessor the right to purchase the premises, Sublessor shall first offer Sublessee the right to purchase the premises, upon the same terms and conditions, and Sublessee shall have thirty (30) days from the date of Lessor's offer to Sublessor to accept or reject.

Lindos, as part of a receivership proceeding, assigned its sublease to No-Pink. The Ellisons executed written consent to this assignment on August 11, 1993, the documentation indicating that the five-year option had been timely exercised and accepted. Defendant Greektown Properties LLC (Greektown) purchased the entire property, including 511 Monroe, from the Ellisons in 1997. On receiving notice of this sale, No-Pink initiated this action seeking equitable relief of specific performance of the right of first refusal.

Defendants present several arguments on appeal. Because we find dispositive the issue of whether the court properly interpreted the language of first refusal when it granted plaintiff summary disposition, we address only two contentions.

First, defendants contend that plaintiff did not have a vested right of first refusal. We disagree. This case deals with an assignment. An assignment occurs when the tenant transfers his interest in all or part of the leased premised for the entire term. *Darmstaetter v Hoffman*, 120 Mich 48, 49-50; 78 NW 1014 (1899). When the Ellisons initially leased 511 Monroe, it was for a ten-year period. Accordingly, the subsequent lease between New Delmar and Lindos (and later No-Pink) was an assignment for all intents and purposes because it covered the remaining duration of the initial lease. No language in the subsequent lease or in the "Consent to Assignment" reserved any interest in the leasehold that could transform the assignment into a sublease. See *Lee v Payne*, 4 Mich 106 (1856).

An assignee/subtenant shares privity of estate, but not privity of contract, with the owner, and "succeeds to all the rights and liabilities of the original lessee." *Darmstaetter, supra* at 49-50. Under privity of estate, the parties are liable for covenants that run with the land. *Buhl Land Co v Franklin Co*, 258 Mich 377, 379-381; 242 NW 772 (1932). Plaintiff's right of first refusal is one such covenant running with the land. *Associated Truck Lines, Inc v Baer*, 346 Mich 106, 112; 77 NW2d 384 (1956); *Nu-Way Service Stations, Inc v Vandenburg Brothers Oil Co*, 283 Mich 551, 552; 278 NW 683 (1938). The right of first refusal is a conditional option to purchase that is dependent on the landlord's willingness to sell. *Ackerman Electrical Supply Co v Koukious*, 16 Mich App 527, 530; 168 NW2d 433 (1969). This first refusal right is assignable and the purchase price is set when the landlord fixes the price at which he is willing to sell. *Brenner v Duncan*, 318 Mich 1, 4; 27 NW2d 320 (1947); see also *Berrien Co Fruit Exchange v Pallas*, 314 Mich 66; 22 NW2d 74 (1946).

Through privity of estate, plaintiff's right of first refusal arose from the original lease between defendants and New Delmar. Defendants contend that this right of first refusal was conditioned upon defendants' accepting an offer of purchase from New Delmar. We disagree. We interpret rights of first refusal narrowly. *LaRose Market v Sylvan Center, Inc*, 209 Mich App

201, 205; 530 NW2d 505 (1995). Here, the contract does not state that the purchaser must be New Delmar. Moreover, the changes in the first refusal provision of the subsequent lease do not signal a limitation or reservation on the right of first refusal. We believe that the modified language simply clarified that New Delmar, and then Lindos, having assigned its complete interest to No-Pink, also had to pass along the first refusal. Otherwise, that right could theoretically come to New Delmar via the privity of contract it still shared with the owner/landlord.[1] The language in the second lease, therefore, merely eliminated a loophole that would have made No-Pink vulnerable to a sale and its right of first refusal worthless.

When the Ellisons accepted an offer of purchase in December 1996, No-Pink's right of first refusal vested. The Ellisons admit that they failed to offer No-Pink first refusal before they sold the property to Greektown. Therefore, No-Pink was entitled to relief for this breach and the court did not err in its findings on this issue.

Nonetheless, the record shows that the parties vigorously contested the scope of the first refusal provision. Specifically, No-Pink contended that the right extended to the entire three-building property, while defendants contended that the right covered only the leased space, 511 Monroe. Defendants also contended that the parties were mutually mistaken in their assumption that 511 Monroe could be sold separately from the remainder of the complex.

We accordingly consider the language in the first refusal provision of the original lease. Where such language is unambiguous, the interpretation of the parties' intent is a question of law that the trial court could properly pass on. *Brown v Schiappacasse,* 115 Mich 47, 50; 72 NW 1096 (1897); *City of Muskegon v Lipman Investment Corp,* 66 Mich App 378, 381; 239 NW2d 375 (1976). However, when contract language is ambiguous, the parties' intent must be discerned from the situation of the parties, the subject matter involved, the object to be accomplished, and the surrounding circumstances. See *Harlow v Lake Superior Iron Co,* 36 Mich 105 (1877).

As previously indicated, the original lease described the right of first refusal as follows:

> (39) In the event Lessor obtains a purchaser for the Leasehold premises, Lessor shall first offer Lessee the right to purchase the premises, upon the same termination and conditions, and Lessee shall have thirty (30) days from the date of such offer to accept of reject.

"A contract is ambiguous if the language is susceptible to two or more reasonable interpretations." *D'Avanzo v Wise & Marsac, PC,* 223 Mich App 314, 319; 565 NW2d 915 (1997). Ambiguity in contract language requires factual development to determine the intent of the parties and summary disposition is, therefore, inappropriate. *Id.;* see also *Longcor v Detroit Homeopathic College,* 210 Mich 575, 579; 178 NW 222 (1920). Only paragraph 39 of the lease refers to the subject property as the "Leasehold premises." Throughout the remainder of the

[1] There is no evidence that the parties executed a novation releasing New Delmar. Therefore, New Delmar remained in privity of contract with the Ellisons. *Buhl, supra* at 379-380; *Plaza Investment Co v Abel,* 8 Mich App 19, 24-25; 153 NW2d 379 (1967).

lease, the property is variously referred to as the "said premises," "the premises," or “the leased premises." We find, therefore, that the language is ambiguous and that the provision is subject to either interpretation offered by the parties.

It is common for a commercial tenant to contract for a right of first refusal over its leased space; it is also possible for the parties to agree that such a right extends to the entire property. See *Nowicki v Kapelczak*, 195 Mich 678; 162 NW 266 (1917). Accordingly, it is reasonable to assert either that the language limits the right to the leased space, 511 Monroe, or that it expands the right to encompass the entire three-building property. Given that different reasonable interpretations of the language in paragraph 39 are possible, an ambiguity exists. *D'Avanzo, supra* at 319-320.

This ambiguity creates a disputed factual issue which must be resolved after receiving evidence that assists the court in discerning the intent of the parties. *Id*. The trial court should have allowed the parties to present additional evidence on the circumstances surrounding the agreement, in order to accurately interpret the ambiguous contract language. Summary disposition was improper.

Reverse and remanded for further proceedings. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Jeffrey G. Collins