STATE OF MICHIGAN

COURT OF APPEALS

TRPKO PAVLOVICH, MARCIA PAVLOVICH and OLIVERA PAVLOVICH, Plaintiffs-Appellants,	UNPUBLISHED May 10, 2002
V	No. 223087 Wayne Circuit Court
ARBOR DRUGS, INC., Defendant-Appellee.	LC No. 98-811501-CK

Before: Neff, P.J., and Wilder and Cooper, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting defendant summary disposition pursuant to MCR 2.116(C)(10) and denying plaintiffs summary disposition. We affirm.

I. Facts and Proceedings

Plaintiffs owned and operated the "Hunter-Wayne Party Store," located on the southwest corner of Hunter and Wayne Roads in the city of Westland. Across Wayne Road, defendants operated a drug store that was located in a strip mall. Adjacent to the strip mall was an undeveloped out-lot, which was not owned by defendant's landlord or plaintiffs.

As defendant's lease renewal date approached in early 1997, defendant was exploring the construction of a free standing drug store. Defendant considered the adjacent out-lot for this expansion, but since this lot was not owned by its landlord and did not appear to be large enough to accommodate the site plan for a free-standing drug store, defendant entered into a lease agreement with plaintiffs on May 28, 1997. The lease agreement provided that defendant would lease plaintiffs property, located at 35201 Hunter Road, for the purpose of constructing a free-standing drug store, and that the lease term would be for twenty-five years, with five additional five-year automatic renewal provisions. In order to construct the drug store, plaintiffs existing store was going to be demolished.

The lease agreement also included several condition precedents found in section 39 of the lease. Among these conditions were provisions 39(a) and (c), which provided, in part:

(a) This Lease is conditional upon Tenant [defendant] satisfying and/or waiving each of the following conditions within one hundred eighty (180) days after the date of this Lease.

(i) This Lease is conditional upon final approval by the City of Westland and all other necessary governmental bodies of Tenant's site plan for the development of the Demised Premises. Tenant shall have complete discretion in the preparation of such site plan for submission to the City of Westland.

* * *

(v) This Lease is conditioned upon Tenant obtaining building permits for its development of the Demised Premises without the imposition of conditions or expense unacceptable to Tenant in its sole and absolute discretion.

* * *

If Tenant shall be diligently procuring the satisfaction of the foregoing conditions, Tenant shall have the right to extend such one hundred eighty (180) day period for an additional ninety (90) days. Tenant shall exercise such right, if at all, by written notice to Landlord [plaintiffs] prior to the expiration of such one hundred eighty (180) day period.

* * *

(c) Within one hundred eighty (180) days after the date of this Lease (or two hundred seventy (270) days, if such period shall have been extended), Tenant shall notify Landlord in writing if the foregoing conditions have been satisfied or waived by Tenant. In the event Tenant fails to notify Landlord within such one hundred eighty (180) day period (or two hundred seventy (270) days, if such period shall have been extended), if all of such conditions have been satisfied or waived, it shall be deemed that such conditions have been satisfied or waived and this Lease shall continue in full force and effect.[1]

After entering into the lease, defendant submitted its original site plan to the Westland Planning Commission for approval. As part of the approval process, defendant's architect met with city planning officials to discuss any revisions to the plan that would enable the plan to meet applicable city ordinance requirements. These discussions led defendant to revise its original plan in several respects; defendant would obtain additional land, change the street access to the store, increase landscaping, keep the existing trees as a buffer for the neighbors, and not

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[1] Other condition precedents set forth in section 39 included adequate soil and environmental conditions for the drug store (this was to be determined by defendant's "sole and absolute discretion"); the purchase of three additional lots by defendant; that plaintiffs provide good and marketable title to the property; that plaintiffs cooperate with defendant in its efforts to meet the conditions; and that plaintiffs turn over the property to defendant within ten days of the conditions being satisfied or waived. These conditions are not in dispute.

construct a drive-through pharmacy. According to the undisputed testimony of defendant's land broker, these revisions caused the project to become one of defendant's most expensive developmental projects. Nonetheless, defendant submitted the revised plan to the planning department and appeared before the Westland Planning Commission on August 5, 1997, seeking approval of the plan. At the meeting, several neighbors voiced concerns about the store and the commission tabled the matter and encouraged defendant to meet with the neighbors to see if their concerns might be accommodated. Representatives of defendant met with the individual spearheading the opposition, whose home was next to the proposed development. This individual informed defendant that she would only support the development if defendant agreed to purchase her home at a cost above fair market value.

On September 3, 1997, defendant's site plan was again scheduled for consideration by the Commission. Once again the Commission tabled the matter and requested that defendant try to satisfy the concerns of those opposing the project. Westland's planning director invited all interested parties to an informal meeting to be held on September 16, 1997. However, defendant instead advised Westland that it was withdrawing its site plan and no longer pursuing the project. Defendant stated in these letters its belief that because of the strong neighborhood opposition to the drug store, the plan would never win the approval of the Planning Commission. Defendant also expressed concern that even if the plan was approved, the long and drawn out planning process would prevent the drug store from being built in a timely fashion. Defendant's vice president also sent a letter to plaintiffs advising them that defendant was unable to fulfill the conditions stated in section 39(a) of the lease agreement, and that therefore the lease was terminated.

Plaintiffs' second amended complaint alleges that defendant breached the lease agreement by acting in bad faith, and further that defendant committed fraud by making false statements to plaintiffs.[2] Defendant denies the allegations and asserts as affirmative defenses that (1) plaintiffs failed to state a claim for which relief could be granted, (2) plaintiffs' claims were barred by the doctrine of waiver or estoppel, and (3) plaintiffs' fraud claim was barred by the economic loss doctrine. Defendant moved for dismissal pursuant to MCR 2.116(C)(8) and (10), contending that it is undisputed that the contract provisions were not met, and that therefore it did not breach the lease agreement. Alternatively, defendant contends that plaintiffs suffered no damages as a result of its decision to terminate the lease and therefore, even if it did breach the agreement, plaintiffs are not entitled to relief.

Plaintiffs filed their own motion for summary disposition in response, contending that defendant did breach the agreement, that they had suffered damages as a result of defendant's breach, and that defendant's breach was not excused by the failure of the conditions provided in section 39(a). Plaintiffs also asserted that defendant had acted in bad faith, demonstrated by its negotiations to acquire the out-lot adjacent to the strip mall. In support of this allegation of bad

[2] While fraud is pleaded in plaintiffs' second amended complaint, plaintiffs did not raise the fraud allegation in their summary disposition motion or on appeal. Thus, plaintiffs have both abandoned and waived this issue. Cf. *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 471-472 ; 628 NW2d 527 (2001), *American Trans, Inc v Channel 7 of Detroit, Inc*, 239 Mich App 695, 705; 609 NW2d 607 (2000), and *Haworth, Inc v Wickes Mfg Co*, 210 Mich App 222, 230; 532 NW2d 903 (1994).

faith dealing by defendant, plaintiffs attached to its motion a memorandum, dated September 16, 1997, from the owner of the out-lot to defendant's vice president, stating that the framework of an agreement between defendant and the owner of the out-lot.

Following arguments on the parties' motions, the trial court granted defendant's motion pursuant to MCR 2.116(C)(10). Specifically, the trial court stated:

> [T]he Court does find that [defendant] had an implied duty to act in good faith as it proceeded through the conditions precedent to performance that were set forth in the lease. And I want to note, for this record, that the lease gave the defendant broad latitude, and I might say, complete discretion, when pursuing both the approval for this site plan and for the building permits, if it got that far, that were needed for actual construction . . . nothing also in this lease expressly required the defendant to wait 180 days before deciding to terminate the lease. . . . I think good faith has to be focused on what actions they took through the City of Westland, through the planning commission efforts. And the fact that they were talking to other people [about potential leases], there's nothing in the lease that says that that's not appropriate.
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> I don't think there's any evidence that the defendant wrongfully sought to prevent the fulfillment of the conditions precedent on this record. They're planning for the contingency, but there's nothing in this record that shows that they willfully sought to cause their efforts to comply with the conditions precedent to fail. And accordingly, the defendant was within its rights in terms of the contract when it terminated the lease. And for these reasons, the motion is granted based on [MCR] 2.116(C)(10).

On September 14, 1999, the trial court entered an order granting defendant summary disposition, denying plaintiffs summary disposition, and dismissing the case. Plaintiffs filed a motion for reconsideration, arguing that the trial court misconstrued the contractual language when it determined that defendant had the sole discretion with regard to the site plan approval, but that it only had discretion as to the content of the site plan. This motion was denied on October 14, 1999.

II. Standard of Review

This Court reviews de novo a trial court's grant of summary of summary disposition pursuant to MCR 2.116(C)(10). *Dressel v Ameribank*, 247 Mich App 133, 136; 635 NW2d 328 (2001), citing *Spiek v Dep't of Transporatation*, 456 Mich 331, 337; 572 NW2d 201 (1998). In reviewing a motion under (C)(10), we consider the pleadings, affidavits, depositions, admissions, and any other documentary evidence in a light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists that would preclude judgment for the moving party as a matter of law. *GC Timmis v Guardian Alarm*, 247 Mich App 247, 252; 635 NW2d 370 (2001), citing *Unisys Corp v Comm'r of Ins*, 236 Mich App 686, 689; 601 NW2d 155 (1999).

In addition, the construction and interpretation of an unambiguous contract is a question of law that we review de novo. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 353; 596 NW2d 190 (1999); *Morley v Auto Club of Michigan*, 458 Mich 459, 465; 581 NW2d 237 (1998); see also *Mich Nat'l Bank v Laskowski*, 228 Mich App 710, 714; 580 NW2d 8 (1998) and *Zurich Ins Co v CCR & Co (On Rehearing)*, 226 Mich App 599, 604; 576 NW2d 392 (1997). Whether terms of a contract are ambiguous is also a question of law that we will review de novo. *Henderson*, *supra*; *Port Huron Ed Ass'n v Port Huron Area School District*, 452 Mich 309, 323; 550 NW2d 228 (1996). In determining whether a contract provision is ambiguous, we are to give the language used its ordinary and plain meaning, *Mich Nat'l Bank*, *supra*, to see if "its words may reasonably be understood in different ways." *Trierweiler v Frankenmuth Mut Ins Co*, 216 Mich App 653, 656-657; 550 NW2d 577 (1996). Thus, "if a word or phrase is unambiguous and no reasonable person could differ with respect to application of the term or phrase to undisputed material facts," summary disposition should be granted to the proper party. *Henderson*, *supra*, citing *Moll v Abbott Laboratories*, 444 Mich 1, 28 n 36; 506 NW2d 816 (1993).

III. Analysis

On appeal, plaintiffs first argue that defendant's decision to terminate the project before November 24, 1997 (the 180th day after the lease agreement was signed), and before the planning commission had made a final decision regarding approval of the project constituted a breach of the lease agreement. We disagree. Plaintiffs also contend that defendant's negotiations for an alternate site for their project was evidence of bad faith in defendant's dealings with plaintiffs, and that defendant could not equitably terminate the agreement. Again, we disagree.

A. The Breach Issue

In interpreting contract language, our main goal is to ensure that the intent of the parties is honored, *Mikonczyk v Detroit Newspapers, Inc*, 238 Mich App 347, 349-350; 605 NW2d 360 (1999). In order to honor that goal, we must first look for the intent of the parties in the words of the contract itself. *UAW-GM v KSL Recreation Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998). If, after looking at the contract language itself, the intent is not discernable and susceptible to more than one interpretation, then factual development is warranted in order to determine the intent of the parties and therefore summary disposition would be inappropriate. *Meagher v Wayne State Univ*, 222 Mich App 700, 722; 565 NW2d 401 (1997).

After reviewing the disputed language in this case, we conclude that the language is clear and unambiguous, *id*. at 721, and that the trial court correctly interpreted the language as a matter of law.

As stated previously, the contract states in part:

> (a) This Lease is conditional upon Tenant satisfying and/or waiving each of the following conditions within one hundred eighty (180) days after the date of this Lease.

> (i) This Lease is conditional upon final approval by the City of Westland and all other necessary governmental bodies of Tenant's site plan for the development of the Demised Premises. Tenant shall have complete discretion in the preparation of such site plan for submission to the City of Westland.

This provision does not prohibit defendant from withdrawing its site proposal from the approval process. The contract also does not require the 180 day time period to expire before the contract could be terminated, or specify any specific number of times defendant was required to submit its proposal to the Planning Commission for approval. In addition to this language, section 39(a)(v) permits defendant to determine whether the imposition of conditions or expenses were unacceptable to defendant in its "sole and absolute discretion." As noted earlier, defendant was convinced that it would not obtain the commission's approval on conditions and at an expense it considered acceptable. Thus, the clear and unambiguous language of section 39(a)(v) permitted defendant to terminate the lease. We reject the contract interpretation articulated by plaintiffs because it would create ambiguity where none exists. *UAW-GM, supra* at 491.

B. Bad Faith Issue

It is well settled that under Michigan law parties to a contract have a duty of good faith and fair dealing in both their performance and the enforcement of the contract. *Flynn v Korneffel,* 451 Mich 186, 213, n 8; 547 NW2d 249 (1996), citing 2 Restatement, Contracts 2d, § 205, p 99; see also *Stark v Budwarker, Inc,* 25 Mich App 305, 317, n 7; 181 NW2d 298 (1970). This is especially true when a party's performance with a contract provision is a "matter of its own discretion." See *Ferrell v Vic Tanny Inter, Inc*, 137 Mich App 238, 243; 357 NW2d 669 (1984), citing 3A Corbin, Contracts, § 644, pp 78-84.

Here, the lease agreement clearly gave defendant "broad latitude" and "complete discretion" in its site plan design, the quest for city approval, and acquiring the building permits. The record does not support plaintiffs' claim that defendant acted in bad faith by using the latitude and discretion it was granted by the contract. Rather, the record establishes that defendant attempted several times to obtain approval of the proposal, engaged in negotiations with disgruntled neighbors, and made significant changes to its original site plan in a good faith effort to reach a mutually agreed upon proposal. Because the lease agreement did not bar defendant from conducting negotiations separate from those conducted in furtherance of the agreement with plaintiffs, the fact of these negotiations is not evidence of bad faith.

C. Waiver of Condition Precedents Issue

Because we conclude that defendant did not act in bad faith, we also conclude that defendant did not waive the right to rely on the failure of the condition precedents to occur and could permissibly rely on such failure to terminate the contract.

A condition precedent is a fact or event that the parties intend must take place before there is a right to performance. *Mikonczyk, supra* at 350; *Reed v Citizens Ins Co,* 198 Mich App 443, 447; 499 NW2d 22 (1993). A condition precedent is different from a promise because a condition precedent creates no right or duty in and of itself, but is only a limiting or modifying factor. *Mikonczyk, supra*. Courts are disinclined from construing contract language as a condition precedent unless it is compelled to by the plain language of the contract. *Id*. If the

condition precedent does not take place, the parties to the contract are excused from performance. *MacDonald v Perry*, 342 Mich 578, 586; 70 NW2d 721 (1955), quoting *Knox v Knox*, 337 Mich 109; 59 NW2d 108 (1953); *Lee v Auto-Owners Ins Corp*, 201 Mich App 39, 43; 505 NW2d 866 (1993), vacated on other grounds 445 Mich 998 (1994). To determine if a provision in a contract is a condition precedent that excuses performance, or simply a promise that does not, the court must consider the "'fair and reasonable construction of the language used in light of all of the surrounding circumstances when they executed the contract.'" *McDonald*, *supra*, quoting *Knox*, *supra*. Here, section 39(a) of the lease agreement clearly stated that the lease was "conditional upon [defendant] satisfying and/or waiving each of the following conditions within . . . 180 days." Thus, it is evident that section 39(a) provided condition precedents that can excuse performance of the contract. *Id*.

A party to a contract may not prevent or hinder the satisfaction of a condition precedent. If it does, the party is deemed to have waived the condition and is then obligated under the contract to perform. *Mehling v Evening News Ass'n*, 374 Mich 349, 352; 132 NW2d 25 (1965); see also *Stanton v Dachille*, 186 Mich App 247, 258; 463 NW2d 479 (1990). Plaintiffs contend that by withdrawing the proposal from consideration, defendant prevented the satisfaction of a condition precedent and is therefore obligated to perform. However, we again note that the record establishes that defendant made several costly revisions to its original site plan, even though it was not obligated to, and negotiated with concerned neighbors in an effort to obtain commission approval of the proposal. Thus, the record does not support plaintiff's claim that defendant attempted to prevent or hinder the satisfaction of any condition precedents, *Mehling*, *supra*, and defendant could permissibly terminate the contract pursuant to section 39(c).

Affirmed.[3]

/s/ Janet T. Neff
/s/ Kurtis T. Wilder
/s/ Jessica R. Cooper

[3] Because we conclude that defendant properly terminated the lease agreement, we need not decide defendant's argument regarding plaintiffs failure to mitigate damages.