STATE OF MICHIGAN

COURT OF APPEALS

NERSES TUFENKJIAN and SHAKEH TUFENKJIAN,

Plaintiffs-Appellants,

and

GOLDSMITH, LTD.,

Plaintiff,

v

MICHIGAN CONSOLIDATED GAS COMPANY, MICHIGAN TRENCHING SERVICE, INC., DETROIT EDISON, and UNDERGROUND TECHNOLOGY, INC., a/k/a U.T.I.,

Defendants,

and

CANTON CONEY ISLAND, FOUAD HUSSEIN, and HASSAN ZEINEDDINE,

Defendants-Appellees.

UNPUBLISHED
October 12, 2004

No. 248844
Wayne Circuit Court
LC No. 01-128216-NZ

Before: Cavanagh, P.J., and Fitzgerald and Meter, JJ.

PER CURIAM.

Plaintiffs Nerses Tufenkjian and Shakeh Tufenkjian ("plaintiffs") appeal as of right from an order granting summary disposition to defendants under MCR 2.116(C)(10). We affirm.

Plaintiffs own the Golden Gate Shopping Center ("the Center"). One of the tenants, defendant Canton Coney Island, Inc. ("CCI"), ordered reconnection of its gas service after finishing repairs to its restaurant following the collapse of the roof at the Center. Michigan Consolidated Gas Company ("MichCon"), through its agent, Michigan Trenching Service, Inc., inadvertently severed an underground electrical power line at the Center's parking lot while

attempting to restore gas service. Plaintiffs brought suit, asserting several claims in an effort to recover for damages resulting from the severed power line.

The sole corporate officer of CCI is Fouad Hussein; his former partner, Hussein Zeineddine, sold his interest in the corporation to Hussein. They are the only individual defendants involved in this appeal. In the second amended complaint, plaintiffs asserted the following theories of liability with regard to defendants: breach of lease covenant, negligence, nuisance, trespass, and statutory conversion.

The roof collapsed at the Center in January 1999, causing a portion of the Center – including Hussein's business – to be shut down for almost a year. As a result of the roof collapse, Hussein had to replace much of the restaurant equipment. Hussein needed the gas restored for his restaurant and called MichCon in late 1999. Hussein gave the MichCon representative a check for $200 to cover the reconnection fee. MichCon never advised Hussein that it was going to upgrade the natural gas capacity for his business. About a week later the gas was restored.

Hussein testified that he was not aware that alterations were being made at the Center to reconnect the gas line. By paying the connection fee, Hussein thought that MichCon was simply going to open a valve. While MichCon told Hussein that "the service line would have to be increased," MichCon never told him that reactivation of his gas service might involve excavation and construction. Hussein did not know what steps MichCon needed to take in order to turn on the gas for the Coney Island restaurant, nor did he know what, if anything, had to be done to facilitate the use of the additional equipment. That determination was made by the MichCon Engineering Department.

The first issue is whether plaintiffs are entitled to be indemnified under the lease, and thus, whether the trial court properly granted summary disposition with regard to plaintiffs' breach of lease claim. Summary disposition of all or part of a claim or defense may be granted when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). "This Court reviews de novo a trial court's grant or denial of summary disposition." *DaimlerChrysler Corp v G-Tech Professional Staffing, Inc*, 260 Mich App 183, 184; 678 NW2d 647 (2004). "The interpretation of a contract is a question of law this Court reviews de novo on appeal, including whether the language of a contract is ambiguous and requires resolution by the trier of fact." *Id.* at 184-185.

The relevant provision of the lease is the indemnity clause. "An indemnity contract is construed in the same manner as other contracts." *Id.* at 185. "Thus, an unambiguous written indemnity contract must be enforced according to the plain and ordinary meaning of the words used in the instrument." *Id.*

Paragraph 14 of the lease limits the obligation to indemnify the landlord for liability to damages "in, on or about said leased premises from any cause whatsoever." It is plain from the unambiguous language of the contract that "leased premises" do not encompass areas outside of the 3,375 square feet leased by CCI and its officers. We conclude that the excavation and damage to the electrical line or to persons or property indisputably did not occur "in, on or

about" the two units leased by CCI. The damage did not occur there; thus, defendants are not obligated under the lease to indemnify plaintiffs.

Plaintiffs next argue that defendants breached the lease by making an alteration in the premises without notifying them. However, requesting MichCon to restore the gas service cannot be reasonably characterized as an alteration of the leased premises. Paragraph 40 of the lease states:

> On the date the Landlord delivers the said premises to the Tenant, the Tenant shall have access to the premises for occupancy, provided all terms and conditions of this lease shall be in full force and effect; except as to the payment of rent, and the Tenant shall have all gas, electric and water/sewer meter billings changed to the Tenant's name and all required insurance policies shall be in full force and effect as provided by this lease.

Because it is clear from this provision that defendants are expected to use gas and other utilities, it is not logical to construe the restoration of a utility service as an alteration, addition, or improvement to the premises. Neither does it make sense to construe the restoration of gas service as an alteration when, as indicated in ¶ 11 of the lease, the premises were leased for the purpose of operating a restaurant – a purpose requiring a source of power for the preparation of food.

The next issue is whether the trial court properly granted summary disposition with regard to plaintiff's negligence claim. We conclude that it did.

It is true that defendants have a common-law duty to perform with ordinary care the tasks they agreed to do in the lease. *Fultz v Union-Commerce Assoc*, 470 Mich 460, 465; 683 NW2d 587, 591 (2004). The duty arises from a contractual relationship. *Id.* The negligent performance of that contract "constitutes a tort as well as a breach of contract." *Id.* Duty arises when "a defendant is under *any* legal obligation to act for the benefit of the plaintiff." *Valcaniant v Detroit Edison Co*, 470 Mich 82, 86 n 4; 679 NW2d 689 (2004) (emphasis in original).

However, "[t]he question whether a duty exists depends in part on foreseeability." *Brown v Michigan Bell Telephone, Inc*, 459 Mich 874, 874; 585 NW2d 302 (1998). To be more specific, the existence of a duty depends on "whether it is foreseeable that the actor's conduct may create a risk of harm to the victim, and whether the result of that conduct and intervening causes were foreseeable." *McMillan v State Hwy Comm*, 426 Mich 46, 61-62; 393 NW2d 332 (1986) (internal citation and quotation omitted).

The lack of a foreseeable risk of harm – and therefore the lack of a duty – characterizes the present case. Plaintiffs argue that defendants owed a duty of care not to damage the Center and that they breached this duty by not notifying plaintiffs about the change in gas service. However, it is undisputed that defendants had no idea that Hussein's request to reconnect the gas service and the payment of a $200 reconnection fee would initiate a chain of events leading to plaintiffs' injury. MichCon's telling Hussein that "the service line would have to be increased" cannot be reasonably interpreted by an untutored customer to mean that construction and trenching are therefore necessary. Hussein testified that he thought that payment of the connection fee would merely result in the opening of a valve. It is simply not reasonable to

expect defendants to have foreseen the chain of events precipitated by Hussein's request to reconnect the gas service. Thus, there is no genuine dispute about the material facts pertaining to this issue.

Nor did defendants breach the contractual duty to perform the obligations of the lease – that is, to notify plaintiffs about alterations on the premises. *Fultz, supra* at 465. Our Supreme Court has explained that, in cases not brought by a third party to the contract, there is a "distinction between misfeasance (action) and nonfeasance (inaction) for tort claims based on a defendant's contractual obligations." *Id.* A tort action is not viable "when based solely on the nonperformance of a contractual duty." *Id.* at 466.

In the present case, plaintiffs assert on appeal a specific claim based on defendants' contractual obligations – that they failed to notify plaintiffs about the request to MichCon to restore gas service. This is an allegation of nonfeasance, or nonperformance, of a contractual duty. Because this allegation attempts to support a tort action based on nonperformance of a contractual duty, plaintiffs' negligence action is not viable. The trial court therefore properly granted defendants' motion for summary disposition with respect to that claim.

Plaintiffs next argue that the trial court erred in failing to address their claims of trespass, nuisance, and statutory conversion. This argument is without merit. As noted above, this Court reviews de novo a grant of summary disposition. Furthermore, this Court reviews the record in the same manner as the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins*, 458 Mich 288, 294; 582 NW2d 776 (1998). Plaintiffs' underlying claims have no merit. "Trespass is an invasion of the plaintiff's interest in the exclusive possession of his land, while nuisance is an interference with his use and enjoyment of it." *The Marble Cleary Tust v The Edward-Marlah Muzyl* Trust, 262 Mich App 485; ___ NW2d ___; 2004 WL 1366029 at 10 (Docket No. 244744, issued June 17, 2004) (internal citations and quotation omitted). The claims of trespass and nuisance fail because the evidence did not indicate that defendants invaded plaintiffs' land or interfered with their use and enjoyment of it. Statutory conversion requires that a defendant knowingly buy, receive, or aid in the concealment of stolen, embezzled, or converted property. MCL 600.2919a. The statutory conversion claim fails because the evidence did not indicate that defendants bought, received, or aided in the concealment of any stolen, embezzled, or converted property. The trial court's failure to address the additional claims was harmless.

Affirmed.

/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter