STATE OF MICHIGAN

COURT OF APPEALS

DOWNTOWN PLYMOUTH VENTURES, L.L.C.,

Plaintiff/Counterdefendant-Appellant/Cross-Appellee,

v

PLYMOUTH FINANCIAL CORPORATION,

Defendant/Crossplaintiff-Appellee/Cross-Appellant.

UNPUBLISHED
November 16, 2004

No. 248567
Wayne Circuit Court
LC No. 01-129552-CH

Before: Zahra, P.J., and White and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right the grant of summary disposition in favor of defendant in this breach of contract action. Defendant cross-appeals the trial court's denial of its motion for damages. We affirm in part and reverse in part.

On appeal, plaintiff asserts the trial court erred in granting defendant's motion for summary disposition because the court improperly engaged in fact finding. A trial court's decision on a motion for summary disposition is reviewed de novo on appeal.[1] *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Contract interpretation involves issues of law that are also subject to de novo review by this Court. *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 238; 615 NW2d 241 (2000).

When interpreting a contract, the cardinal rule is to first ascertain the intent of the parties. *Klapp v United Ins Group, PC*, 468 Mich 459, 475; 663 NW2d 447 (2003). This Court reads the agreement as a whole and attempts to apply the plain language of the contract itself to enforce

[1] The trial court stated that it was deciding the motions under MCR 2.116(C)(8) and (C)(10). However, a motion under MCR 2.116(C)(8) tests the "legal sufficiency of the complaint on the basis of the pleadings alone." *Mack v Detroit*, 467 Mich 186, 193; 649 NW2d 47 (2002). Because the trial court specifically noted that it was considering depositions and documentary evidence, we consider these motions as having been determined pursuant to MCR 2.116(C)(10).

the parties' intent. *Old Kent Bank v Sobczak*, 243 Mich App 57, 63; 620 NW2d 663 (2000); *Dillon v DeNooyer Chevrolet Geo*, 217 Mich App 163, 166; 550 NW2d 846 (1996). "In interpreting contracts capable of two different constructions, we prefer a reasonable and fair construction over a less just and less reasonable construction." *Old Kent Bank, supra*, 243 Mich App 63, citing *Schroeder v Terra Energy, Ltd*, 223 Mich App 176, 188; 565 NW2d 887 (1997).

At the time it was created, the contract at issue involved a lease agreement between a building that had not yet been built and a bank that had not yet been formed. The contract included the following language:

> The term of this Lease shall be for a period of 10 years, commencing on April 1, 2001 (hereinafter referred to as the commencement date" [sic]), fully to be completed and ended on March 31, 2011. In the event Landlord fails to deliver premises on the commencement date because the demised premises are then ready for occupancy, or because the previous occupant of said premises is holding over, or for any cause beyond Landlord's control, Landlord shall not be liable to Tenant for any damages as a result of Landlord's delay in delivering the demised premises, and the commencement date of this Lease shall be postponed until such time as the demised premises are ready for Tenant's occupancy.

While the language is direct and contains no complex terms of art, plaintiff asserts that the term "not" was inadvertently omitted from the contract language and should have been included within the phrase "because the demised premises are [not] then ready for occupancy." When deposed, one of defendant's agents acknowledged that the lease provision did not make sense without insertion of the word "not." The trial court agreed.

As a general rule of law,

> it is not the province of the court by construction or by the addition of words or punctuation to remake the contract of the parties or to find a meaning not intended. Where ambiguity exists, however, it is the duty of the court to determine, if possible, the true intent of the parties by construction of the instrument. [*Henry v J B Publishing Co*, 54 Mich App 409, 413; 221 NW2d 174 (1974), citations omitted.]

Defendant argues on appeal that the word "not" should not have been added by the trial court to the contract provision here. As both parties conceded below, inclusion of the word "not" clarifies the parties' contract in this case. A party cannot concede an issue below and then raise a challenge to the same issue on appeal. *Marshall Lasser, PC v George*, 252 Mich App 104, 109; 651 NW2d 158 (2002). Under the terms of the contract, the parties contemplated that plaintiff might not be ready to deliver the premises on the commencement date because: (a) the premises were not ready for occupancy, (b) a prior tenant held over, or (c) any other reason not within plaintiff's control. In each of those circumstances, the contract provided that plaintiff would not be liable for damages as a result of the delay, "and the commencement date of this Lease shall be postponed until such time as the demised premises are ready for Tenant's occupancy." While defendant contends that the language of the contract would obligate them without limitation, the argument is merely an acknowledgment that the leased premises might not be ready at the commencement date. Indeed, as one of defendant's agents stated, the occupancy date was not as

high a priority as one might think at the time the contract was written, because, at that time, "there was no [defendant] bank." Given the parties' acknowledgment that the lease was the result of ongoing and prolonged negotiations between sophisticated parties who had the advice and input of counsel, the fact that the deal may not, in retrospect, have been favorable to defendant is not a basis to interpret the contract contrary to its plain meaning.

Contrary to the trial court's finding that the commencement date was significant for performance, the language of the contract permitted postponement of the commencement date for an unspecified period "until such time as the demised premises are ready for Tenant's occupancy." This language, the absence of a "time is of the essence" provision, and the acknowledgement by defendant's agent that the commencement date was not considered a "must have" or priority date, all support our conclusion. In addition, defendant did not act to repudiate the contract, or seek assurances from plaintiff until three or four months after the commencement date had passed. In light of the contract language and the circumstances in this case, the trial court erred in determining that the commencement date was so clearly significant as to entitle defendant to summary disposition. In this case, where the question which party breached the contract "depends upon other and extrinsic facts in connection with what is written," "the question of interpretation should be submitted to the jury.'" *D'Avanzo v Wise & Marsac, PC,* 223 Mich App 314, 319; 565 NW2d 915 (1997), citations omitted.

Further, even if the April 1, 2001, date were deemed significant, the trial court erred in concluding that occupancy by October 1, 2001, was not reasonable. The question of what constituted a "reasonable time" for occupancy was disputed by the parties and, under the facts and circumstances here, was a question of fact that made summary disposition inappropriate. *Toebe v Dept of State Highways,* 144 Mich App 21, 31; 373 NW2d 233 (1985).

On cross-appeal, defendant contends that the trial court erred in interpreting the contract language to preclude an award of damages to defendant. We disagree. The contract provided that plaintiff was not liable for damages caused by its failure to deliver the premises on the commencement date.

The trial court's grant of summary disposition to defendant is reversed. The trial court's order denying defendant's motion for damages is affirmed.

/s/ Brian K. Zahra
/s/ Helene N. White
/s/ Michael J. Talbot