

STATE OF MICHIGAN
COURT OF APPEALS

SPEAKEASY PLAZA, LLC.,

Plaintiff/Counter-defendant-
Appellant,

v

SCOTT GRAVES, M.D.,

Defendant/Counter-plaintiff-
Appellee.

UNPUBLISHED
December 18, 2007

No. 271451
Genesee Circuit Court
LC No. 03-075959-CK

Before: Jansen, P.J., and O'Connell and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's judgment in its favor and a judgment of no cause of action against defendant with regard to the counter-complaint. We affirm.

Plaintiff's action arises from a commercial lease agreement. Defendant rented the premises from plaintiff and conducted his medical practice in the building. After a period of occupancy, sewage backups and odor from the sewer began to occur. Defendant alleged that the building was unsuitable for occupancy, causing him to vacate the premises. Plaintiff filed suit for breach of contract, unpaid rent, and the cost of improvements. Following a bench trial, plaintiff was awarded unpaid rent for the month before the sewage leak, late fees from the unpaid rent, and the cost of grass and snow removal. The trial court held that defendant failed to mitigate his damages and was not entitled to damages arising from the counter-complaint.

Plaintiff first alleges that the trial court erred in holding that it breached an implied warranty that the premises were fit for the purposes of a medical office. We disagree. Following a bench trial, we review the trial court's findings of fact for clear error, but conclusions of law are reviewed de novo. *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*, 264 Mich App 523, 531; 695 NW2d 508 (2004). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id.* However, when the issue involved requires interpretation of a contract, our review is de novo. *Pickering v Pickering*, 268 Mich App 1, 13; 706 NW2d 835 (2005).

Review of the record reveals that plaintiff has misstated the trial court's holding. The trial court did not impose an implied warranty of habitability for commercial property. Rather,

the trial court found a breach of duty by plaintiff, the landlord, with regard to repair of the premises after the sewage leak and that breach of duty relieved defendant of its obligation to pay rent following this sewage incident. Therefore, plaintiff's characterization of the ruling does not entitle it to relief.

Plaintiff next alleges that the trial court erred in concluding that the sewage backup constituted a "casualty" as set forth in the lease agreement. We disagree. The goal of contract construction is to determine and enforce the parties' intent based on the plain language of the contract itself. *Old Kent Bank v Sobczak*, 243 Mich App 57, 63; 620 NW2d 663 (2000). When the language of a contract is clear and unambiguous, its construction presents a question of law for the trial court. *Michigan National Bank v Laskowski*, 228 Mich App 710, 714; 580 NW2d 8 (1998).

Review of the agreement at issue reveals that the landlord was responsible for repairing and restoring the premises when damage or destruction occurred as a result of fire or some other casualty. The agreement did not define casualty. However, the trial court held that the occurrence at issue constituted a "casualty" within the terms of the lease agreement. The trial court noted that defendant, as the tenant, was held accountable when damage was the result of his negligence or willful act. The trial court held that the occurrence at issue constituted a "casualty" because it was not an isolated incident, but the result of an unanticipated event – an illegal or improper connection between the building and the municipal sewer lines. The initial sewage problem was remedied when the drains were "snaked" out, but a later, more severe event revealed that the cause was far greater than anyone actually realized. Applying the factual scenario to the contract language, we cannot conclude that the trial court's factual finding was clearly erroneous. *Glen Lake, supra*.

Plaintiff further argues that the trial court erred in holding that the article nine of the lease agreement was violated when defendant failed to raise this provision in his affirmative defenses. We disagree. The trial court held that plaintiff breached the contract, and the general rule in Michigan is that a party who first substantially breaches a contract cannot maintain an action against the other party for a subsequent failure to perform. *Flamm v Scherer*, 40 Mich App 1, 8-9; 198 NW2d 702 (1972). Moreover, although defendant did not specifically identify article nine of the lease agreement as an affirmative defense, he identified plaintiff's breach of the terms of the lease agreement as a defense to plaintiff's complaint. Specifically, defendant's third affirmative defense provided: "Contrary to the provisions of the Lease, plaintiff failed to repair damage to the premises caused by the back up of sewage, rendering it uninhabitable." Under the circumstances, plaintiff's challenge is without merit.

Lastly, plaintiff asserts defendant's nonpayment of rent occurred before the more severe sewage back up, and this breach continued when defendant failed to pay rent thereafter. We disagree. As an initial matter, we note that plaintiff failed to cite authority in support of its position. A statement of position without more is insufficient to raise an issue before this Court. *In re Reisman*, 266 Mich App 522, 533; 702 NW2d 702 NW2d 658 (2005). However, in light of the trial court's factual findings regarding the condition of the premises after the sewage incident and the fact that the building was "tagged," we cannot conclude that the trial court's factual findings regarding breach of the terms of the agreement were clearly erroneous. *Glen Lakes, supra*.

Affirmed.

/s/ Kathleen Jansen

/s/ Peter D. O'Connell

/s/ Karen M. Fort Hood