STATE OF MICHIGAN

COURT OF APPEALS

MONTHIR NISSU and TANYA NISSU, Plaintiffs-Appellants, v LAR PROPERTIES, L.L.C., Defendant-Appellee.	UNPUBLISHED July 31, 2008 No. 278404 Wayne Circuit Court LC No. 06-623931-CH

Before: Saad, C.J., and Fort Hood and Borrello, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a circuit court order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) in this declaratory action. For the reasons set forth in this opinion, we reverse the trial court and remand for further proceedings. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiffs leased a commercial building (and adjoining real property) from defendant. The area that plaintiffs leased was a part of a larger parcel of property owned by defendant. At the time the lease was executed, the entire larger parcel was identified as "Ward 9, Item 6632.001" for tax identification purposes. A January 4, 2002, survey depicted the property as divided into parcels 1 through 8. The survey also shows the same property divided into parcels A, B, and C. The record does not indicate which of the numbered parcels correspond to "Ward 9, Item 6632.001." The commercial building has the same boundaries as Parcel A.

The parties' lease provides that plaintiffs are to pay rent of $1 a year, plus additional rent in an amount based on a percentage of property taxes assessed by "the local taxing authorities." The lease provides, in pertinent part:

> In addition to the rent to be paid, Tenant shall pay to Landlord as additional rent, the portion of the property taxes assessed against the leased premises by the local taxing authorities. Tenant's portion shall be equal to a percentage of the total real estate taxes and assessments attributable to Landlord's entire parcel, being Ward 9, Item 6632.001, the numerator of which is the square footage of land covered by this Lease and the denominator of which shall be the square footage of Landlord's entire parcel ("Tenant's Percentage"). Landlord shall present an annual statement to Tenant enumerating the property tax assessed

> against the leased premises, with the appropriate portion to be paid by Tenant to Landlord within thirty (30) days of transmittal.

After the lease was executed, defendant petitioned the city of Detroit to split the parcels so as to eliminate parcels 1 through 8 and to issue new tax bills for Parcels A, B, and C, individually. Plaintiffs also requested the city of Detroit to split Parcel A from Parcels B and C.

At some point before December 30, 2004, the city of Detroit revised the configuration of the parcels for taxing purposes. The newly configured parcels, identified as 09006630, 09006631, and 09006632, correspond to Parcels C, B, and A, respectively. Although defendant initially asserted that plaintiff was responsible for only a percentage of the taxes assessed against 09006632, defendant later advised plaintiffs that they were responsible for the 100 percent of the property taxes assessed against 09006632, regardless of the formula set forth in the parties' lease.

Plaintiffs brought this declaratory action and sought a determination of "the exact amount of real estate taxes owed by Plaintiff to Defendant."

In lieu of filing an answer, defendant moved for summary disposition pursuant to MCR 2.116(C)(4) and (10). Defendant argued that it was clear from the lease that plaintiffs agreed to pay "whatever real property taxes are assessed against the leased premises by the local taxing authorities," and therefore, there was no need for clarification of plaintiffs' responsibilities by the court.

The trial court agreed with defendant, reasoning:

> I think that formula that was initially set forth was there because one piece of parcel was a lease and, therefore, there was no effective way other than what was leased in there.
>
> But it is clear. It is precise that your clients agreed to pay the taxes on the parcels that they leased. And that's all I'm saying.

The court later concluded that plaintiffs only owed the amount of the 2004 taxes stated in a July 5, 2005, letter, but were liable for 100 percent of the taxes for subsequent years. The court thereafter denied plaintiffs' motion to amend their complaint to add a claim for reformation of the lease.

On appeal, plaintiffs argue that the trial court erred in granting defendant's motion for summary disposition because, under the lease, they "did not agree to pay the amount assessed against the leased parcel, they agreed to pay the taxes pursuant to a formula that included a mathematical exercise that included the taxes assessed against more than their parcel." Conversely, defendant argues that the parties intended that plaintiffs would pay for the real property taxes attributable to the portion being leased and, once the parcel was split so that the leased premises was taxed as a separate parcel, there was no longer any need to use the formula. Because we find that a genuine issue of fact exists regarding plaintiff's obligations under the lease agreement, we reverse the trial court's grant of summary disposition and remand to the trial court for further proceedings consistent with this opinion.

Summary disposition may be granted under MCR 2.116(C)(10) when "there is no genuine issue of material fact, and the moving party is entitled to judgment . . . as a matter of law." This Court reviews a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

This case involves the interpretation of a lease agreement.

> In interpreting a contract, our obligation is to determine the intent of the contracting parties. If the language of the contract is unambiguous, we construe and enforce the contract as written. Thus, an unambiguous contractual provision is reflective of the parties' intent as a matter of law. Once discerned, the intent of the parties will be enforced unless it is contrary to public policy. [*Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003).]

Although the trial court referred to plaintiffs' obligation to pay property taxes, the lease does not obligate plaintiffs to pay the taxes, but rather to pay *as additional rent* an amount that is calculated using the property taxes as a factor. The method for determining the amount of the additional rent is specified in the lease. The phrase, "the portion of the property taxes assessed against the leased premises by the local taxing authorities," must be read in conjunction with the following sentence, which specifies the formula for determining the tenant's "portion" of the property taxes that is to be paid as additional rent.

Although the reconfiguration of the parcels for tax assessment purposes complicated the calculation of the tenant's portion pursuant to the formula in the lease, because real estate taxes and assessments are no longer assessed on a larger parcel designated as Ward 9, Item 6632.001, the reconfiguration is not a basis for disregarding the formula agreed to by the parties for determining the additional rent that plaintiffs owed. The court essentially reasoned that the purpose of the formula was to approximate the property taxes attributable to the leased premises and that it was no longer necessary to apply the formula because the reconfiguration of the parcels provided an exact amount of taxes assessed against the leased premises. But even if the trial court's perception of the purpose of the formula is accurate, it did not allow the court to rewrite the contract to conform to its perception of the parties' intentions, contrary to the formula in the lease. As explained in *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51; 664 NW2d 776 (2003),

> [t]his approach, where judges divine the parties' reasonable expectations and then rewrite the contract accordingly, is contrary to the bedrock principle of American contract law that parties are free to contract as they see fit, and the courts are to enforce the agreement as written absent some highly unusual circumstance, such as a contract in violation of law or public policy. [.]

See also *Quality Products & Concepts Co*, *supra* at 362.

The record does not presently provide enough information to enable us to determine the total real estate taxes and assessments attributable to former "Ward 9, Item 6632.001" or even to resolve whether the figure could be calculated. If the calculation cannot be performed in accordance with the parties' agreement, that obstacle may be a basis for discharging the parties

from further obligation under the contract and authorize the court to modify the contract for the purpose of fashioning a remedy for part performance. See *Unihealth v U S Healthcare, Inc*, 14 F Supp 2d 623 (D NJ, 1998). At this point, we may not predict how the case may develop factually and legally. We only conclude that, for present purposes, when the evidence is viewed in the light most favorable to plaintiffs, there is a genuine issue of material fact regarding plaintiffs' obligation to pay additional rent in accordance with the parties' lease. Accordingly, the trial court erred in granting defendant's motion for summary disposition.

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

/s/ Henry William Saad
/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello