STATE OF MICHIGAN

COURT OF APPEALS

LANCASTER & YORK L.L.C.,

Plaintiff/Counter-Defendant-Appellant,

v

CITY OF PONTIAC,

Defendant/Counter-Plaintiff/Third-Party-Plaintiff-Appellee,

v

LAWRENCE MCKENZIE and GREG MCKENZIE, d/b/a OAKLAND OFFICE INTERIORS AND MCKENZIE MOVING & FREIGHT SYSTEMS, INC.,[1]

Third-Party-Defendants.

UNPUBLISHED
September 25, 2008

No. 276528
Oakland Circuit Court
LC No. 05-065336-CH

PER CURIAM.

Plaintiff/Counter-Defendant Lancaster & York L.L.C ("plaintiff") appeals by delayed leave granted from the trial court's order granting summary disposition to defendant/counter-plaintiff/third-party-plaintiff City of Pontiac ("defendant"). We affirm in part, reverse in part, and remand this matter for further proceedings consistent with this opinion.

I. Background

Plaintiff owns a parcel of property on Woodward in Pontiac. At all relevant times, the property was zoned as C-3, "fringe CBD [central business district] and thoroughfare frontage business district," which permits the property to be used for warehousing, storage, distribution,

[1] The third-party defendants, collectively referred to as "McKenzie," are not involved in this appeal as they reached a settlement with defendant City of Pontiac after the trial court's final order of October 3, 2006, was entered.

retail business, and other similar uses. The crux of this appeal involves various cease and desist orders placed upon the property by defendant, which provide that plaintiff is required to obtain site plan approval for the building and install a sprinkler system prior to occupying it.

Plaintiff leased the property to Chemico Systems, Inc. (Chemico) from 1996 to 2002. Pursuant to the lease, Chemico would use the property for office, warehousing, and manufacturing/distributing nonhazardous chemicals. In addition to using the property for those indisputably permitted uses, in 1997 Chemico, unbeknownst to plaintiff, submitted to defendant an "Application for Site Plan Review," requesting that defendant allow it to use the building for a paint-cleaning process that required the installation of ovens. Without securing the consent of plaintiff, defendant approved Chemico's request, allowing the property to be used as "light industrial." The use variance never changed the zoning of the property.[2] In plaintiff's unverified complaint, it makes an unverified allegation that only 15 percent of the building was used for the paint-cleaning process, while the rest of the property was used in accordance with the uses permitted under C-3.

In early 2002, Chemico vacated the premises in accordance with its lease, taking all of its paint-cleaning machinery with it. In 2004, plaintiff entered into negotiations with McKenzie to lease the property. McKenzie sought to use the property for warehouse and storage. McKenzie moved into the property at some point in 2005 or 2006, the exact date being unknown. McKenzie appears to have used the property for storage of office furniture, in accordance with the property's permitted uses under the C-3 classification. McKenzie vacated the property on August 31, 2006. No entity occupied the property between Chemico and McKenzie.

II. Analysis

Plaintiff first contends that the trial court erred in granting defendant's motion for summary disposition because defendant failed to establish that there was no genuine issue of material fact that the property's "permitted principal use" under the Pontiac Zoning Ordinance had changed, or that a sprinkler system is required on the basis of a previous use of the property.[3]

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[2] Although defendant refers to a "use variance" allegedly having been granted to Chemico, there is no documentation entitled "variance" in the record. The document that defendant repeatedly refers to as the "Woodward Variance," is actually a two-sentence letter from one of defendant's representatives to Chemico stating that "the City Planning Commission approved Site Plan Review for a light industrial use given the following conditions: . . . ." There are no conditions listed. Although Chemico's application to use the property as light industrial was approved, it is not clear whether an actual and formal "use variance" was ever issued.

[3] As an initial matter, we note that plaintiff failed to exhaust its administrative remedies. The Pontiac Zoning Ordinance provides that the zoning board of appeals (ZBA) is vested with the power to hear and decide appeals regarding the interpretation of the zoning ordinance and to review any order or decision by defendant in carrying out or enforcing any provision of the ordinance. Pontiac Zoning Ordinance, § 13.2. Plaintiff never appealed defendant's cease and desist orders to the ZBA, and thus its lawsuit is premature. *Conlin v Scio Twp*, 262 Mich App 379, 383; 686 NW2d 16 (2004). Plaintiff's failure notwithstanding, the trial court nevertheless had subject matter jurisdiction over this dispute because defendant filed a counterclaim seeking a

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We agree, finding that the record is incomplete and does not establish one way or the other regarding whether the property's principal use had changed. We therefore reverse the trial court's order granting summary disposition in defendant's favor on this matter, and remand for further consideration of defendant's counter-claims.

This Court reviews de novo a trial court's decision on a motion for summary disposition, *Washington v Sinai Hosp*, 478 Mich 412, 417; 733 NW2d 755 (2007), viewing the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party, *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). A motion brought pursuant to MCR 2.116(C)(10)[4] should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001).

Plaintiff first argues that the trial court erred in ruling that it was required to comply with the cease and desist orders, because the orders would only be applicable if the property's permitted principal use had changed. Plaintiff points to § 5.11 of the Pontiac Zoning Ordinance, which provides that site plan approval is required when a building is "converted to a different principal permitted use." Plaintiff argues that there was no change in the principal permitted use of the property, and thus, it was not required to submit a new site plan, obtain a new certificate of occupancy, or comply with the most recently enacted building codes – which require the installation of a fire suppression system. Defendant counters that the permitted principal use of the building had indeed changed. Defendant claims that Chemico obtained a "use variance" from defendant that allowed Chemico to use the property for light industrial, which is different from the use engaged in by plaintiff's subsequent tenant, McKenzie. McKenzie used the building as warehouse, storage and office.

Defendant has failed to establish as a matter of law that the property's *principal* use has ever changed. Instead, based upon this record, we conclude that a genuine issue of material fact exists on this question. Section 2.7 of the ordinance defines "principal use" as "[t]he primary and chief purpose for which a lot is used." The ordinance does not define "primary" or "chief" but does state that "[t]erms not herein defined shall have the meanings customarily assigned to them." Pontiac Zoning Ordinance, § 2.2. This Court interprets an ordinance the same way it interprets a statute, according words their plain and ordinary meaning. *Brandon Charter Twp v*

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declaratory judgment that plaintiff must comply with the cease and desist orders, including the requirement that it install a sprinkler system. In granting defendant's motion for summary disposition, the trial court not only dismissed plaintiff's complaint, it went beyond that by affirmatively determining that plaintiff is required to apply for site plan review and comply with all current code requirements including the installation of a sprinkler system, and that plaintiff must pay $55,500 for 555 days worth of violations. Given that the trial court's ruling was premised in part on defendant's counterclaim, it cannot be upheld solely on the basis of plaintiff's failure to exhaust administrative remedies.

[4] Defendant moved for summary disposition pursuant to MCR 2.116(C)(4), (C)(8) and (C)(10). Because the parties went beyond the pleadings in presenting their arguments, their claims are reviewed under MCR 2.116(C)(10). *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999).

Tippett, 241 Mich App 417, 422; 616 NW2d 243 (2000). When determining the ordinary meaning of a undefined word or phrase, consulting a dictionary is appropriate. *Stanton v City of Battle Creek*, 466 Mich 611, 617; 647 NW2d 508 (2002). The dictionary defines "principal" as "first or highest in rank, importance, value, etc.; chief; foremost." *Random House Webster's College Dictionary* (2001). The dictionary definition of "primary" is "first in rank or importance; chief." *Id.* The dictionary defines "chief" as "most important; principal." *Id.*

The record before us does not contain any detailed facts concerning Chemico's use of the property. Defendant fails to discuss how Chemico used the property after the use variance, instead making unsupported allegations that the granting of a use variance for a paint-cleaning process, in and of itself, is sufficient to establish as a matter of law that the principal use of the property changed. Furthermore, while plaintiff maintains that Chemico's principal use of the property was warehouse, storage and office, and that paint-cleaning was an incidental use of the property that took up only approximately 15 percent of the building's space, plaintiff's contention is merely a statement in an unverified complaint that is not supported by any evidence. The record before us therefore fails to establish one way or the other regarding whether the paint-cleaning process was the principal, primary, or chief use of the property. Given that in bringing its motion for summary disposition, it was incumbent upon defendant to prove that there was no genuine issue of material fact that the property's *principal* use had changed, it follows that the trial court erred when it granted summary disposition in defendant's favor on this matter.

Moreover, defendant has not proven that the Michigan Building Code's use classifications, which are relevant for purposes of determining, among other things, whether a sprinkler system is required, are relevant in determining the property's "permitted principal use" under the zoning ordinance. The fact that the building code differentiates between the storage of office furniture and the storage of combustibles does not necessitate a finding that the property's principal permitted use, as defined by the zoning ordinance itself, has changed.

Defendant argues that, even if the permitted principal use had not changed, plaintiff would still be required to install a sprinkler system because Chemico's use of the building was classified by the building code as H-2 (applicable to buildings that contain combustible and flammable liquids and gases), and all H-2 buildings must have sprinkler systems. Notably, the letter that defendant relies upon as being the "use variance" stated that there were *no requirements* upon which defendant was conditioning its grant of the variance. Further, not once during the approximately six years that Chemico occupied the property did defendant seek to sanction plaintiff or Chemico for failure to install a sprinkler system.[5] It was not until two years after Chemico vacated the premises, and took with it the only materials that warranted the installation of a sprinkler system, that defendant posted the cease and desist orders on the property. Those facts aside, even if the variance "runs with the land," as defendant suggests, a

[5] Given that the 1997 team inspection report of the property requested by Chemico states that all H-2 classified buildings must have a sprinkler system, it is unclear why the subsequent 1998 letter from defendant to Chemico stated that it was approving Chemico's request for light industrial use with no conditions.

sprinkler system is required under the building code only insofar as the building's use classification triggers the sprinkler system requirement. Even if the property's use was properly classified as H-2 while Chemico was occupying it, the property has ceased to be classified as H-2 since 2002. Accordingly, defendant has not presented sufficient evidence to support its contention that plaintiff is presently required to install a sprinkler system on the basis of a previous use. Although there may be other bases upon which a sprinkler system is required (apart from a change in use or a previous use of the property), defendant's motion for summary disposition failed to provide these bases. Thus, the trial court's determination that a sprinkler system is required on these facts was in error.

Finally, plaintiff argues that the $55,500 judgment against it should be reversed because the trial court had no basis upon which to hold that the property was unlawfully occupied for 555 days. We agree.

The Pontiac Zoning Ordinance provides that the failure to comply with a provision of the ordinance constitutes a violation, and every day on which a violation exists constitutes a separate violation and offense. Pontiac Zoning Ordinance, § 15.1. It further states that a violation is punishable by a fine of no less than $100 and no more than $500. *Id*. at § 15.2.

Defendant argues that the property was unlawfully occupied by McKenzie and/or plaintiff from December 10, 2004, through at least August 18, 2006. To support this contention, defendant cites the affidavit of Gregory McKenzie, the owner of the third-party-defendant entities. McKenzie's affidavit, however, states no such thing. It is clear that McKenzie occupied the property at some point in 2005 and/or 2006. McKenzie admitted in his opposition to defendant's motion for summary disposition that he had been a tenant of plaintiff and had vacated the property "as of August 31, 2006." Also, one of defendant's employees observed a truck, presumably one of McKenzie's, unloading goods into the building on May 5 and 10, 2006. However, significantly, the record is not clear about when McKenzie moved into the property or how long he stayed. McKenzie's deposition makes clear that, as of August 3, 2005, he had not yet moved into the property. Defendant presents no evidence to support its claim that the property was occupied for 555 days in violation of the cease and desist orders and/or the court's orders. Accordingly, the trial court's finding that the property was unlawfully occupied for 555 days is in error. Furthermore, as previously discussed, defendant has not established that there is no genuine issue of material fact that the property's permitted principal use changed or that plaintiff is required to install a sprinkler system based on a previous use. Consequently, the trial court erred in holding that the property was occupied in violation of the ordinance on these bases, and the $55,500 judgment against plaintiff should be reversed.

The judgment against plaintiff in the amount of $55,500 is reversed, as is the portion of the order providing that defendant may, as a matter of law, obtain entry of a permanent injunction in the event that plaintiff seeks to reoccupy the property without complying with all code requirements, including the sprinkler system requirement. The portion of the order dismissing plaintiff's claims is affirmed because plaintiff failed to exhaust administrative remedies by appealing defendant's actions to the ZBA. We remand for further proceedings regarding whether the granting of a use variance to Chemico, so that it could use the building for a paint cleaning process (light industrial work), and Chemico's subsequent use of the building constituted a change in the principal use of the property, and would require plaintiff to obtain site

plan approval and install a sprinkler system before occupying the property. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ William C. Whitbeck
/s/ Michael J. Talbot