STATE OF MICHIGAN

COURT OF APPEALS

AMERICAN STATES INSURANCE COMPANY and MARK RATCLIFF, d/b/a MARK RATCLIFF CONSTRUCTION COMPANY,

Plaintiffs-Appellees,

v

RICK HAMPTON, d/b/a VIP TRUCK & TRAILER REPAIR, and MIKE FORBES,

Defendants-Appellants.

UNPUBLISHED
October 28, 2008

No. 279022
Wayne Circuit Court
LC No. 05-522975-NZ

Before: Meter, P.J., and Talbot and Murray, JJ.

PER CURIAM.

I. Introduction

This action arises from a fire that damaged a commercial building owned by plaintiff Mark Ratcliff. The fire was caused by defendant Mike Forbes, an employee of defendant Rick Hampton, d/b/a VIP Truck & Trailer Repair ("VIP"), who leased a portion of the building. Plaintiff and his insurer, American States Insurance Company, brought a complaint against defendants Hampton and Forbes for subrogation and recovery of the uninsured loss, asserting negligence and breach of contract claims. Defendants filed a motion for summary disposition, to which plaintiffs responded by seeking summary disposition in their favor. The trial court granted summary disposition in favor of plaintiffs on the question of liability. Following a bench trial on damages, the court awarded plaintiffs a judgment of $462,446.89, and later awarded plaintiffs case evaluation sanctions of $56,207.26. We affirm in part, vacate in part, and remand for further proceedings consistent with this opinion.

II. Facts and Proceedings

As noted above, plaintiffs' complaint alleged claims for negligence and breach of contract. The breach of contract claim was based on the following provision in the lease agreement between Ratcliff and Hampton:

> 4. Repairs and Alterations. Lessee shall be responsible for damages caused by his negligence and that of his family or invitees and guests. Lessee shall not paint, paper or otherwise redecorate or make alterations to the premises

> without the prior written consent of Lessor. All alterations, additions, or improvements made to the premises with the consent of Lessor shall become the property of Lessor and shall remain upon and be surrendered with the premises.

Paragraph 5 of the lease also required defendant Hampton to "keep and maintain the premises in a clean and sanitary condition at all times, and upon the termination of the tenancy shall surrender the premises to Lessor in as good condition as when received, ordinary wear and damage by the elements excepted." Additionally, under paragraph 10 of the lease, plaintiff Ratcliff reserved the right to enter the premises "for the purpose of inspection, and whenever necessary to make repairs and alterations," or "to show the demised premises to prospective purchasers, mortgagees, tenants, workmen, or contractors at reasonable hours of the day."

In their response to defendants' motion for summary disposition, plaintiffs argued that the trial court should not only deny defendants' motion, but also should enter an order granting them summary disposition on all counts in their complaint. MCR 2.116(I)(2). In deciding the parties' request for summary disposition, the trial court held that defendants were responsible for the fire damage under the plain terms of the lease:

> You know, Mr. Mulcahy, I always find it interesting when two insurance companies battle about who should really cover the loss. And to me, the only logical, reasonable way to interpret this contract or this lease agreement is that the lessee is to be responsible for damage caused by his own negligence or that of his family or invitees or guests.
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> So it's pretty clear to me that the defendants in the case are responsible for the damages. I don't see any other way to look at it, they are responsible. And you step in as subrogee and even though the defendants ask for summary disposition, to me this is a clear case where the defendants not only are not entitled to summary disposition, but I think summary disposition as sought by the plaintiffs is appropriate. Because it's a clear case of negligence, the lease addresses the issue of negligence, and I think it's kind of a close case.
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> So I am accordingly going to deny the defendant's [sic] motion for summary disposition and I'm going to grant the plaintiff's [sic] counter motion for summary disposition.

After a three-day bench trial, the trial court entered a final judgment[1] from which defendants now appeal as of right.

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[1] The parties spend a great deal of time on appeal arguing over plaintiffs' negligence claim. However, the order granting summary disposition and the final judgment do not specify upon what claim or claims the trial court found liability. Our reading of the trial court's reasoning on the record appears to be that defendants were liable to plaintiffs on the contract claim. In any event, as detailed in this opinion, liability is proper against defendants on the contract claim. MCR 2.613(A).

III. Analysis

Defendants first argue that the trial court erred in denying its motion for summary disposition and in granting plaintiffs' request for summary disposition with regard to defendants' liability for the fire damage. We hold that the trial court should have dismissed plaintiffs' negligence claim, but properly granted plaintiffs' motion on the contract claim.

This Court reviews a trial court's grant or denial of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition pursuant to MCR 2.116(C)(10) should be granted if the evidence demonstrates that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001). In deciding a motion on this ground, the trial court considers any pleadings, affidavits, depositions, admissions, or other submitted documentary evidence in a light most favorable to the nonmoving party to determine whether a genuine issue of fact exists. MCR 2.116(G)(3)(b); *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

We agree with defendants that this Court's decision in *New Hampshire Ins Group v Labombard*, 155 Mich App 369, 373, 376; 399 NW2d 527 (1986), is applicable to plaintiffs' negligence claim and precludes defendants' liability in negligence for the fire damage. In *Labombard*, the defendant tenant entered into a lease that required him to return the premises in good condition, but nothing in the lease agreement suggested that the defendant would be liable to either the landlord or the insurer "for the full amount of negligently caused fire damage." *Id.* at 376. This Court held that "absent an express and unequivocal agreement by a tenant to be liable to the lessor or the lessor's fire insurer in tort for negligently caused fire damage to the premises, the tenant has no duty to the lessor or insurer which would support a negligence claim for such damages." *Id.* at 377.

Here, the lease agreement established the parties' agreement that defendant Hampton would "be responsible for damages caused by his negligence or that of his family or invitees and guests." Although this language, as discussed more thoroughly below, does create enforceable contract rights and obligations, it does not contain the specificity required by *Labombard*. Hence, because the lease does not contain any language revealing an "express and unequivocal" agreement by defendant Hampton to be liable in tort for negligently causing a fire, plaintiffs negligence claim should have been dismissed.

However, plaintiffs also asserted a breach of contract claim, and in *Laurel Woods Apartments v Roumayah*, 274 Mich App 631; 734 NW2d 217 (2007), this Court distinguished *Labombard* on the basis that *Labombard* involved a negligence claim, while *Laurel Woods* involved a breach of contract claim. *Laurel Woods, supra* at 636-637. Thus, while *Labombard* controlled plaintiffs' negligence claim, *Laurel Woods* controls plaintiffs' breach of contract claim. And, as shown below, *Laurel Woods* compels a finding of contractual liability against defendants.

In *Laurel Woods* the lease agreement included a paragraph titled "Maintenance Repairs and Damage of Premises," which provided that the "tenant shall also be liable for any damage to the Premises or to the Landlord's other property . . . that is caused by the acts of omissions of Tenant or Tenant's guests." This Court opined that the language in the lease unambiguously

provided that the defendants were liable for the damages caused by the negligently caused fire. *Laurel Woods, supra* at 636-640. Here, the language in the lease is similar to that found to create contractual liability in *Laurel Woods*, as the parties agreed that defendant Hampton would be "responsible for damages caused by his negligence" or that of his invitees and guests. As the trial court noted, "the only logical, reasonable way to interpret this contract . . . . is that the lessee is to be responsible for damage caused by his own negligence or that of his family or invitees . . . ." It is undisputed that the fire was accidentally caused by one of Hampton's employees. Accordingly, based upon the plain language of the lease, the undisputed facts and the law as announced in *Laurel Woods*, plaintiffs were properly awarded summary disposition on the contract claim. We therefore affirm the trial court's liability determination.

This leads us to the issue of damages, which defendants opine were miscalculated by the trial court. A trial court's determination of damages at a bench trial is reviewed for clear error. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 513; 667 NW2d 379 (2003). Because the trial court's damage award was based on negligence principles, we vacate the award and remand for a determination of the contract damages to which plaintiffs are entitled. Compare *Antoon v Community EMS, Inc*, 190 Mich App 592, 596; 476 NW2d 479 (1991) (a "tortfeasor generally is liable for all injuries resulting directly from his wrongful acts" that were reasonably anticipated) with *Ferguson v Pioneer State Mut Ins Co*, 273 Mich App 47, 54; 731 NW2d 94 (2006) (contract damages are premised on parties receiving the benefit of their bargain, so aggrieved party is entitled to value of benefits that would have been received under the contract).

The parties agreed below that where there has been an injury to land, "the general measure of damages is the diminution in value of the property if the injury is permanent or irreparable." *Kratze v Independent Order of Oddfellows*, 442 Mich 136, 149; 500 NW2d 115 (1993). The trial court must also determine what was precisely bargained for, so that plaintiffs do not receive more than what was contracted for under the lease.[2] On remand the trial court shall make new findings of fact to determine the appropriate damages for breach of contract.[3]

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[2] In determining the market value of property before and after it has been damaged, there are different methods that can be utilized, including replacement cost less depreciation, the purchase price of the property, any pre-damage appraisals, the valuation of the property for tax purposes, or the selling price of similar properties. *Strzeleck v Blaser's Lakeside Industries of Rice Lake, Inc*, 133 Mich App 191, 194-197; 348 NW2d 311 (1984). There is no fixed rule of measurement, and mathematical certainty is not required, but proof of damages may not be founded on mere conjecture or speculation. *Id.* If, on the other hand, the damage to the property is reparable, "the proper measure of damages is the cost of restoration of the property to its original condition, if less than the value of the property before the injury." *Kratze, supra* at 149.

[3] We leave to the trial court whether new evidence is needed, or if it can make the necessary findings based upon the current record.

Finally, defendants challenge the trial court's decision to award case evaluation sanctions, an issue that involves a question of law that is reviewed de novo. *Elia v Hazen*, 242 Mich App 374, 376-377; 619 NW2d 1 (2000). The trial court's decision regarding the amount of sanctions awarded is reviewed for an abuse of discretion. *Id*.

Because we have vacated the negligence ruling and the award that went with it, and the trial court must make a new award for breach of contract, we need not address the case evaluation award. Instead, on remand the trial court can determine whether case evaluation sanctions are appropriate after a new damages award, and if so, in determining the amount of attorney fees it must apply the criteria set forth in the recent decision of *Smith v Khouri*, 481 Mich 519; 751 NW2d 472 (2008).

For the reasons set forth above, we affirm the finding of liability against defendants, vacate the tort damage award and award of case evaluation sanctions, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Michael J. Talbot
/s/ Christopher M. Murray