STATE OF MICHIGAN

COURT OF APPEALS

COUNTRY CLUB OFFICE CENTER, L.L.C.,

Plaintiff,

v

G.L. & ASSOCIATES, INC., d/b/a PRUDENTIAL CHAMBERLAIN/STIEHL REALTORS,

Defendant/Third-Party Plaintiff-Appellee,

and

CRANBROOK REALTORS, INC., GEORGE P. ULRYCH and MITCHELL J. WOLF,

Third-Party Defendants-Appellants.

UNPUBLISHED
August 4, 2009

No. 284239
Oakland Circuit Court
LC No. 2007-080867-CH

Before: Talbot, P.J., and Fitzgerald and Hoekstra, JJ.

PER CURIAM.

Third-party defendants-appellants Cranbrook Realtors, Inc., George P. Ulrych, and Mitchell J. Wolf (collectively the Cranbrook appellants) appeal as of right the February 27, 2008 final judgment. The judgment followed the trial court's order granting summary disposition in favor of plaintiff Country Club Office Center, LLC (Country Club) and in favor of third-party plaintiff-appellee G.L. & Associates, Inc. (G.L.). We affirm in part, reverse in part, and remand for further proceedings not inconsistent with this opinion.

I. Summary of the Facts

In 1998, G.L. entered into a ten-year lease with Country Club for office space in a multi-tenant building in Farmington Hills. In 2004, G.L. and Cranbrook Realtors entered into an Asset Purchase Agreement, whereby G.L., *inter alia*, assigned its interest in the Farmington Hills lease

to Cranbrook Realtors.[1] G.L. also assigned to Cranbrook Realtors its interest in five other leases for office space. Two years later, Cranbrook Realtors stopped paying rent for the Farmington Hills office. Subsequently, Country Club sued G.L. for breach of contract. G.L., in turn, filed a third-party complaint against the Cranbrook appellants for indemnification. The trial court granted summary disposition to Country Club on the complaint because it found that there was no genuine issue of material fact that G.L. was contractually obligated to pay rent for the Farmington Hills office for a ten-year period. The trial court also granted summary disposition to G.L. on the third-party complaint because it found that, pursuant to the clear and unambiguous terms of the Asset Purchase Agreement, the Cranbrook appellants were obligated to defend and indemnify G.L. It also held that, if Cranbrook Realtors did not fully indemnify G.L., the indemnification obligations of Ulrych and Wolf were "joint and several for 100" percent.

II. Summary Disposition

The Cranbrook appellants argue that G.L. was not entitled to summary disposition because G.L.'s negligence in failing to obtain Country Club's written consent to the assignment of the Farmington Hills lease is a complete bar to its indemnification claim. The Cranbrook appellants also argue that the individual liability of Ulrych and Wolf is limited to 50 percent of the outstanding obligations.

We review a trial court's grant of summary disposition de novo. *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 437; 695 NW2d 84 (2005). A summary disposition motion made pursuant to MCR 2.116(C)(10) tests the factual support for a claim, *id.*, and is properly granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, *Brown v Brown*, 478 Mich 545, 552; 739 NW2d 313 (2007).[2] The moving party has the initial burden to produce documentary evidence to support its position. *E R Zeiler Excavating, Inc v Valenti Trobec Chandler, Inc*, 270 Mich App 639, 644; 717 NW2d 370 (2006). The nonmoving party must then present evidence to demonstrate that a genuine issue of material fact exists. *Id.*

We also review de novo issues of contract interpretation. *DaimlerChrysler Corp v Wesco Distribution, Inc*, 281 Mich App 240, 245; 760 NW2d 828 (2008). "In interpreting a contract, our obligation is to determine the intent of the contracting parties. If the language of the contract is unambiguous, we must construe and enforce the contract as written. Thus, an unambiguous contractual provision is reflective of the parties' intent as a matter of law." *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003) (internal citations omitted).

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[1] Cranbrook Realtors is jointly owned by Ulrych and Wolf.

[2] G.L. also moved for summary disposition under MCR 2.116(C)(8). Because G.L. relied on matters outside of the pleadings, we review the motion as made under MCR 2.116(C)(10). *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 457; 750 NW2d 615 (2008).

The Cranbrook appellants first argue that the trial court erred in granting summary disposition to G.L. because it failed to consider their argument that G.L. was negligent in failing to obtain Country Club's written consent to the assignment of the Farmington Hills lease. According to the Cranbrook appellants, G.L.'s negligence is a complete bar to its claim for indemnification. Although the trial court did not explicitly address the Cranbrook appellants' negligence argument in its opinion and order, there is no indication that the court failed to consider the argument before ruling. Indeed, at the summary disposition motion hearing, the trial court stated that it had "reviewed [the] briefs" and "listened carefully" to the arguments. Thus, there is no basis from which to conclude that the trial court, in granting G.L.'s motion for summary disposition, failed to consider the Cranbrook appellants' negligence argument.

Furthermore, on de novo review, we find no merit to the Cranbrook appellants' negligence argument. The Asset Purchase Agreement contained conflicting provisions regarding whether G.L. or Cranbrook Realtors was to obtain Country Club's consent to the assignment. However, the indemnification clause of the Asset Purchase Agreement provides, in relevant part:

> **Lease Obligation Indemnification.** Subject to the "Lease Obligation Limitation" set forth herein, [Cranbrook Realtors], Ulrych and Wolf, jointly and severally, shall defend, indemnify, and hold harmless [G.L.] . . . from and against any and all costs, losses, claims, liabilities, fines, expenses, penalties, and damages . . . in connection with or resulting from [Cranbrook Realtors'] failure to perform or observe in full any covenant, agreement, or condition to be performed or observed by the tenant in the *leased offices . . . for which [Cranbrook Realtors] has not obtained a release of [G.L.'s] obligations under such leases* (collectively, the "Indemnifiable Leases"). [Emphasis added.]

"[B]road indemnity language may be interpreted to protect the indemnitee against its own negligence if this intent can be ascertained from other language in the contract, surrounding circumstances, or from the purpose sought to be accomplished by the parties." *Sherman v DeMaria Bldg Co, Inc*, 203 Mich App 593, 597; 513 NW2d 187 (1994) (internal quotation omitted). Regardless whether G.L.'s failure to obtain Country Club's consent to the assignment of the Farmington Hills lease constituted negligence, the Asset Purchase Agreement unambiguously conveys the parties' intent that G.L. is protected against its own negligence. The Agreement expressly states that the Cranbrook appellants are to indemnify G.L. for their failure to perform on any lease "for which [Cranbrook Realtors] has not obtained a release of [G.L.'s] obligations under such leases." Accordingly, the trial court did not err in concluding that, pursuant to the unambiguous language of the Asset Purchase Agreement, the Cranbrook appellants were required to indemnify G.L.

The Cranbrook appellants also argue that it is they who are, in fact, entitled to indemnification under the Asset Purchase Agreement. The provision on which the Cranbrook appellants rely provides, in relevant part:

> **Indemnification.** [G.L.] . . . shall defend, indemnify, and hold harmless [the Cranbrook appellants] . . . from and against any and all costs, losses, claims, liabilities, fines, expenses, penalties, and damages . . . in connection with or resulting from the following . . . :

* * *

> Any inaccuracy in any representation warrants or breach of any representation warranty of [G.L.] . . . ;
>
> Any failure by [G.L.] to perform or observe in full, or to have performed or observed in full, any covenant, agreement, or condition to be performed or observed by [G.L.] under this Agreement or any other agreement[.]

It is unnecessary to resolve whether G.L.'s failure to obtain Country Club's consent to the Farmington Hills lease constituted a breach of the Asset Purchase Agreement. The Cranbrook appellants have not identified any loss incurred as a result of any action by G.L. This case is a result of Cranbrook Realtors' failure to pay rent on the Farmington Hills office to Country Club. The Cranbrook appellants have not, and could not, argue that Cranbrook Realtors' obligation to pay rent resulted from any improper action by G.L. The Cranbrook appellants' argument is unavailing.

The Cranbrook appellants next argue that the trial court erred in determining that the individual liability of Ulrych and Wolf is 100 percent of the obligation not satisfied by Cranbrook Realtors. The relevant portion of the indemnification clause provides:

> For the purposes of this Agreement, the Lease Obligation Limitation shall limit Ulrych and Wolf's indemnification obligations to 50% of the tenant's liabilities or obligations outstanding at any time during the respective terms of the Indemnifiable Leases; provided, however that Ulrych and Wolf's indemnification obligations shall be 100% of the tenant's liabilities and obligations outstanding *in the event that [Cranbrook Realtors] secures releases from the landlords of all but one of the leases set forth on Schedule 9.10.2*.[3] . . . . [Emphasis added.]

G.L. claims that the 50 percent limitation does not apply because it "has been released from the other leases (either expressly or through their expiration through the passage of time) under all but one of the leases identified in Schedule 9.10.2." However, pursuant to the clear and unambiguous language of the Asset Purchase Agreement, the individual liability of Ulrych and Wolf is 50 percent of the tenant's outstanding obligations unless Cranbrook Realtors secured releases from all but one of the landlords of the six leases. Here, G.L. has presented no evidence to establish that Cranbrook Realtors secured releases "from the landlords of all but one of the leases." Because G.L. has not presented any documentary evidence to establish that the only condition that would fix the individual liability of Ulrych and Wolf at 100 percent of the tenant's outstanding obligations was met, the trial court erred in concluding that there was no question of material fact that the individual liability of Ulrych and Wolf was 100 percent of the outstanding obligations.

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[3] Schedule 9.10.2 lists the six leases, including the Farmington Hills lease, that G.L. assigned to Cranbrook.

III. Final Judgment

The Cranbrook appellants argue that the trial court erred in entering a final judgment in favor of G.L. and against them because G.L. never moved for entry of a final judgment. Review of this unpreserved issue is for plain error affecting substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

In its motion for entry of judgment against G.L., Country Club expressly stated that "the final judgment should reflect a similar amount owed by Cranbrook to [G.L.], plus its reasonable attorneys' fees." In the last paragraph of its response to Country Club's motion, G.L. wrote, "[G.L.] therefore requests that whatever amount [the trial court] determines is appropriate to include in the Judgment in [Country Club's] favor and against [G.L.] also be included in the Judgment as the amount [G.L.] can recover against Cranbrook, Ulrych and Wolf, jointly and severally, plus the reasonable attorneys' fees [G.L.] has incurred defending this lawsuit . . . ." Accordingly, the Cranbrook appellants were on notice that G.L. was requesting a final judgment against them. The trial court did not plainly err in entering a final judgment against the Cranbrook appellants.

Affirmed in part, reversed in part, and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra