STATE OF MICHIGAN

COURT OF APPEALS

LANCASTER & YORK, LLC,

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,

Third-Party-Defendants.

UNPUBLISHED
August 12, 2010

No. 291129
Oakland Circuit Court
LC No. 2005-065336-CH

Before: WILDER, P.J., and CAVANAGH and SAAD, JJ.

PER CURIAM.

Plaintiff, Lancaster & York , LLC, appeals the trial court's grant of summary disposition to defendant, City of Pontiac. For the reasons set forth below, we affirm in part and reverse in part.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff owns property on Woodward Avenue in Pontiac that is zoned C-3, "fringe CBD [central business district] and thoroughfare frontage business district." The zoning designation permits property to be used for warehousing, storage, distribution, retail business, and other similar uses. Chemico leased the property from plaintiff from 1996 until 2002. In 1998, Chemico sought to use a portion of the property for its paint-cleaning business, which would require the installation of ovens. To that end, Chemico applied for a use variance. The meeting minutes from a Pontiac Zoning Board of Appeals (ZBA) meeting on March 10, 1998, show that the ZBA voted to approve the variance at a public hearing. In 2002, Chemico vacated the premises and removed all of its paint-cleaning equipment from the building. The zoning of the

property remained C-3. In 2004, McKenzie negotiated with plaintiff to lease the property for its business, Oakland Office Interiors, for warehousing and storing office furniture, which complies with the C-3 zoning designation.

Defendant posted a cease and desist order on the door of the property on December 10, 2004, because of an alleged violation of defendant's zoning ordinance § 5.11 which provides that "no building or structure shall be *converted to a different principal permitted use*" without site plan approval through the Pontiac building commission. (Emphasis added.) In considering whether to approve a site plan, § 5.11 provides that the building commission will determine whether the plan conforms to all requirements of the zoning ordinance. This process would require plaintiff to comply with all current building code requirements, including the installation of a sprinkler system, and to obtain a new certificate of occupancy. In its complaint, plaintiff alleged that there was no change in the "*permitted principal use*" of the property such that it would be required to comply with the directives in the cease and desist orders. In its counterclaim, defendant asserted that, pursuant to the "use variance" obtained by Chemico, the property's permitted principal use became light industrial and this required plaintiff to obtain site plan approval for the building and comply with the most recently enacted building and fire codes.

The trial court granted summary disposition to defendant and this Court reversed. *Lancaster & York v Pontiac*, unpublished opinion per curiam of the Court of Appeals, issued September 25, 2008 (Docket No. 276528). This Court ruled that defendant failed to show there is no genuine issue of material fact that the principal use of the property changed such that site plan approval was required under § 5.11 of the Pontiac Zoning Ordinance. This Court explained:

> 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.

On remand, the trial court again granted defendant's motion for summary disposition. The court ruled that there was a change in use by Chemico, plaintiff was aware of the change and, regardless of whether the use changed, it was appropriate for defendant to rely on the Michigan Building Code (MBC) to determine that plaintiff must install a sprinkler system in the building.

II. MOTION TO STRIKE

Plaintiff contends that the trial court erred when it denied its motion to strike the document purported to be a copy of the ZBA minutes from the meeting on March 10, 2008, at which the board granted Chemico a use variance.[1] Plaintiff contends that the transcript is hearsay, but we agree with defendant that the transcript falls within the official record exception under MRE 803(8). This exception provides that the hearsay rule does not exclude "[r]ecords, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency . . . ." The transcript falls within the exception because it is a record of a public agency that sets forth the activities of the agency. The transcriptionist's affidavit suggests that she generally typed and provided copies of ZBA transcripts for later board approval. And, while not required by the rule, it appears that minutes of ZBA meetings were regularly kept by defendant, as required by statute, MCL 125.3602 (the ZBA must "maintain a record of its proceedings") and by the ordinance governing the issuance of variances, § 13.2.b (when a variance is granted, "there shall be entered in the minutes of the board, as a part of the record in each case of a requested variance, the findings enumerated [in the ordinance] in support of the variance").[2]

The crux of plaintiff's argument is really that the transcript may not be authentic and that defendant's explanation for its late production is suspect. With regard to the authenticity of the document, MRE 901(a) provides that, "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Here, defendant submitted the transcriptionist's affidavit in which she stated that the transcript is an accurate reflection of the ZBA meeting held on March 10, 1998. Though she relied on her notes from eleven years prior to transcribe the meeting, it was within the trial court's discretion whether to accept her assertion as evidence of the document's authenticity. Other than plaintiff's assertion that its principal, Christopher Redding, failed to recall the meeting, plaintiff points to nothing within the minutes themselves or in any other evidence that would indicate the transcript is not authentic. Moreover, other documents show that Chemico applied for a variance around the time of the meeting, the matter was discussed at a prior ZBA meeting, the meeting minutes were approved

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[1] As this Court explained in *Genna v Jackson*, 286 Mich App 413, 422; 781 NW2d 124 (2009):

> A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007).

"To the extent that this inquiry requires examination of the meaning of the Michigan Rules of Evidence, we address such a question in the same manner as the examination of the meaning of a court rule or a statute, which are questions of law that we review de novo." *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002).

[2] Though plaintiff claims defendant denied that it kept such records, the record reflects that plaintiff had requested minutes of *weekly meetings of the licensing and zoning inspectors*, not monthly ZBA meeting minutes.

on the record at the May 12, 2998 meeting, and the building commission later acknowledged the approval of light industrial operations on the property. This evidence, in addition to the transcriptionist's affidavit, tends to support defendant's assertion that the meetings minutes are authentic.

Plaintiff maintains that the trial court should have sanctioned defendant for failing to produce the evidence sooner. However, the trial court accepted as true defendant's assertion about how it discovered the document was missing. Plaintiff cites MCR 2.313(B)(2)(c) as a basis for sanctions. However, as defendant points out, defendant did not violate a direct order to produce the evidence, so there was no basis for the trial court to strike defendant's claims, dismiss the action, or declare a default as anticipated by the court rule. And, though plaintiff complains that defendant violated a duty to supplement its discovery responses under 2.302(E)(2), defendant asserts that it believed its responses were complete when made and it turned over the document as soon as it was discovered. Under the circumstances, the trial court did not abuse its discretion by failing to sanction defendant for its failure to produce the document earlier in the litigation. *McDonald v Grand Traverse County Election Com'n*, 255 Mich App 674, 700-701; 662 NW2d 804 (2003).

III. SUMMARY DISPOSITION

Plaintiff argues that the trial court erred when it granted summary disposition to defendant.[3]

As noted, defendant posted the cease and desist order on the door of the property because of an alleged violation of defendant's zoning ordinance § 5.11 which provides that "no building or structure shall be *converted to a different principal permitted use*" without site plan approval through the Pontiac building commission. (Emphasis added.) On remand, the trial court ruled in favor of defendant because, under the MBC, a sprinkler system is required for Chemico's use of the property and for McKenzie's proposed use of the property. The court further ruled that plaintiff was aware that Chemico wanted to conduct light manufacturing operations on the

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[3] The trial court granted summary disposition to defendant pursuant to MCR 2.116(C)(10). As this Court explained in *Meridian Charter Twp v Ingham County Clerk*, 285 Mich App 581, 586; 777 NW2d 452 (2009):

> We review a trial court's decision on a motion for summary disposition de novo on the basis of the entire record to determine whether the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, we consider all the admissible evidence submitted by the parties in the light most favorable to the nonmoving party. *Maiden*, 461 Mich at 120; MCR 2.116(G)(6). Summary disposition should be granted only where the evidence fails to establish a genuine issue regarding any material fact. *Maiden*, 461 Mich at 120.

property and that, at the ZBA meeting, the board members discussed a need for fire protection. The court ruled that, accordingly, regardless whether there was a change in use, the city codes and ordinances required a sprinkler system to be installed.

"'It is the duty of the lower court . . ., on remand, to comply strictly with the mandate of the appellate court.'" *Schumacher v Department of Natural Resources*, 275 Mich App 121, 128; 737 NW2d 782 (2007), quoting *Rodriguez v Gen Motors Corp (On Remand)*, 204 Mich App 509, 514; 516 NW2d 105 (1994). Contrary to this Court's prior opinion, defendant failed to establish, and the trial court failed to determine, whether the principal use of the property changed under defendant's zoning ordinance.

The trial court correctly observed that the issue of sprinklers was discussed at the ZBA hearing. At the March 10, 1998 ZBA meeting, one of the board members stated:

> [Chemico] will have to meet all of the city's applicable codes before they can occupy the building. The City's fire Marshall has reviewed it relative to the fire code of the city and they must comply with his desires in terms of sprinklers and what have you as it relates to that building.

Before the ZBA voted on Chemico's variance request, another member of the board stated that he would "offer the use variance with the condition that if any of the conditions that are presented by the Planning Commission are violated, he absolutely loses the use variance. . . . . [¶] On the basis of that, I make the recommendation that the use variance be granted with that condition." The board then voted to grant the variance request.

There is no document in the record that could be considered a copy of the variance itself or any documents that set forth requirements that Chemico must fulfill as part of the grant of the variance. As was the case before remand, the only writing appears to be "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." Lancaster & York, unpub op at 2 n 2. Thus, though the matter was discussed at the ZBA meeting, it does not appear that the planning commission required any changes to the property and no documents state that the variance was contingent upon the installation of sprinklers.

In any case, as this Court previously ruled, to trigger plaintiff's obligation to alter the building to meet new code requirements and to obtain a new site plan and certificate of occupancy, there had to be a showing that there was a *change in the principal use of the property under § 5.11*. Accordingly, we agree with plaintiff that it was error for the trial court to simply rule that defendant could impose new building code requirements and impose fines on plaintiff for failing to obtain site plan approval and a new certificate of occupancy. While, arguably, defendant may have been within its rights to rely on the MBC in interpreting its ordinances, its own ordinances state that site plan review is required when the principal use of the property has changed. As this Court explained in its prior opinion:

> [D]efendant 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.

Again, for these reasons, the trial court's grounds for granting summary disposition to defendant were erroneous and not in keeping with this Court's directions on remand.

With regard to the evidence presented on remand, defendant again failed to show that there is no genuine issue of material fact that Chemico *changed the principal use of the property* such that a site plan was required when McKenzie sought to use the property for warehousing and storage. Accepting as true that the ZBA approved Chemico's request to operate a "light industrial" paint-cleaning operation on the premises, defendant has not shown that the paint-cleaning operation was the "principal, primary, or chief use of the property."

Defendant points out that, in its variance application, "Chemico never discussed any warehousing use for the Woodward property." However, the absence of such a "discussion" does not establish that Chemico changed the primary use of the property. Defendant also notes that, in its application, Chemico explained that, after the heating process, the parts would be transferred to a pickling area and then to a wash area. Defendant does not explain whether this would also contravene the zoning designation but, more importantly, the application simply does not explain the extent to which the primary use of property would change or the extent to which Chemico would continue to use the property in a manner consistent with the C-3 zoning designation. Moreover, regardless of Chemico's assertions in its variance application, defendant provides no evidence to show how the property was actually used by Chemico after it was allowed to install and operate its cleaning ovens. As this Court observed in its prior opinion, the evidence lacking here is proof that, after the variance was issued, the principal use of the property actually changed.

Defendant points out that, before Chemico applied for the variance, the business was shut down because Chemico was using at least part of the building in a manner inconsistent with the C-3 zoning. This may, indeed, constitute evidence that Chemico changed the use of the building to some unknown degree before the variance was issued and the variance itself suggests that Chemico changed its use of the property to some degree thereafter. Again, however, at issue is whether the *principal* use of the building changed within the meaning of the ordinance as set forth by this Court in its prior opinion.

In the initial proceedings before the trial court, plaintiff asserted that Chemico's paint-cleaning operation occupied only 15 percent of the building and that this establishes that there was no change in the principal use of the property. This Court noted that plaintiff's assertion was an "unverified allegation." On remand for further factual development, plaintiff submitted the affidavit of Mr. Redding, the sole member of Lancaster & York, who stated that Chemico's paint-cleaning operation occupied less than 16 percent of the building. The affidavit specifically provides:

> 5. The total square footage of the Property is approximately 42,000.

6. Chemico installed a paint-removing oven that used approximately 7,000 square feet, or approximately 16% of the total square footage of the Property.

7. The remaining 35,000 square feet of the Property (approximately 84% of the building) was used by Chemico for the approved use of warehousing distribution and office until Chemico vacated the premises.

Through Mr. Redding's affidavit, plaintiff presented evidence that Chemico's principal use of the property remained consistent with the C-3 zoning and this was sufficient to create a genuine issue of material fact for trial. As this Court stated in the prior opinion, "[g]iven 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." For the same reason, the trial court again erred when it granted summary disposition to defendant on remand.[4]

We affirm the trial court's denial of plaintiff's motion to strike, but reverse the grant of summary disposition to defendant.[5]

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Henry William Saad

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[4] The trial court ruled that defendant correctly imposed $55,500 in fines on plaintiff because, regardless of whether there was a change in the primary use of the property, plaintiff was required to obtain site plan approval and install a sprinkler system. This was erroneous for the reasons set forth above. We also disagree with the trial court's ruling because, even if plaintiff violated the ordinance, there is conflicting evidence in the record with regard to how long McKenzie occupied the property.

[5] Plaintiff asks us to remand this case "to another circuit court of its choosing . . . ." Plaintiff believes that, because the court is located in Pontiac, and based on the prior rulings of the trial court judges in this case, it cannot obtain a fair trial in Oakland Circuit Court. We see no evidence of bias in the record but, more importantly, plaintiff has no legal basis for asking this Court to remand this case to another county. The only legal authority plaintiff cites in support of its request is MCR 2.222, which provides that "[t]he court may order a change of venue of a civil action, or of an appeal from an order or decision of a state board, commission, or agency authorized to promulgate rules or regulations, for the convenience of parties and witnesses or when an impartial trial cannot be had where the action is pending." This is not a rule of appellate procedure, but is a matter that should first be considered and decided in the trial court.