# STATE OF MICHIGAN

# COURT OF APPEALS

MINNESOTA PUBLIC RADIO,

Plaintiff/Counter-Defendant-Appellee,

v

LAKE SUPERIOR COMMUNITY BROADCASTING CORPORATION,

Defendant/Counter-Plaintiff-Appellant.

UNPUBLISHED
October 26, 2010

No. 294139
Houghton Circuit Court
LC No. 2007-013478-CK

Before: MURPHY, C.J., and BECKERING and M.J. KELLY, JJ.

PER CURIAM.

In this contract dispute, defendant/counter-plaintiff Lake Superior Community Broadcasting Corporation appeals as of right the September 1, 2009, judgment entered pursuant to a stipulation by the parties. The stipulation and judgment followed the trial court's July 2, 2009, opinion and order denying defendant's motion for summary disposition and granting in part plaintiff/counter-defendant Minnesota Public Radio's motion for summary disposition. We affirm.

I

Plaintiff operates a radio station, and defendant operates a television station. This dispute involves the tower and building used to broadcast the parties' signals. The tower and building are located on leased land in Adams Township, Houghton County, Michigan.

According to the parties, it is believed that Michigan Technological University (MTU) began leasing the land and using the original tower and building in the 1970s. At the time, Copper Range Company ("Copper Range") owned the land. In 1981, MTU donated its radio station license, the tower, and the building, among other rights and privileges, to plaintiff. MTU also subleased the land to plaintiff. Plaintiff continued to use the original tower and building until 1996. Plaintiff also continued to lease the land, which was conveyed by Copper Range to Mead Paper Company ("Mead") and then by Mead to Escanaba Paper Company ("Escanaba").

Sometime in 1996, the president of Scanlon Television, Inc. ("Scanlon"), defendant's predecessor, proposed tearing down the tower and replacing it with a new tower that could be

used to broadcast both plaintiff's and Scanlon's signals. Scanlon and plaintiff entered into a contract, dated June 1996 and entitled simply "Agreement" (hereinafter "1996 agreement"), in which Scanlon agreed to construct a new tower. Scanlon also agreed to provide plaintiff with new transmitting equipment and rent-free use of the new tower. In exchange, plaintiff agreed to sublease the land to Scanlon so that Scanlon could construct the new tower, and to provide Scanlon with rent-free use of its building. Specifically, the 1996 agreement stated, in part:

> 1. MPR will provide space in the MPR Building, and will sublease the land which it currently leases from Mead Paper Company[1] to ST[2] for ST's use for constructing the new ST Tower for its television station . . . .
>
> * * *
>
> 7. MPR's lease of the ST Tower in accordance with this Agreement shall be for the life of the ST Tower and any replacement towers and shall survive any disposition by ST of the ST Tower. ST's use of the MPR Building shall be for the life of the MPR building and any replacement buildings and shall survive any disposition by MPR of the MPR Building.
>
> > 7.1 MPR shall offer to ST its lease of land from Mead Paper Company in the event MPR should cancel its lease with Mead Paper Company.
> >
> > 7.2 MPR will be charged no other cash rent for its use of the ST Tower as set forth in this Agreement, and ST will be charged no other cash rent for its use of the MPR Building.
>
> 8. Except for the provisions set forth above, no fees are due from either party to the other. This is a good faith agreement, and seeks full cooperation between the parties, such that the public shall benefit from the broadcast services provided to area listeners and viewers by MPR and ST.
>
> * * *
>
> 11. This Agreement is assignable by either party to a succeeding party, provided the terms and conditions are carried forward to all assignees. Should any assignee desire to modify any of the terms and conditions in this Agreement, then both MPR (or its assignors or successors-in-interest) and ST (or its assignors or successors-in-interest) must agree to any changes before the assignment can be consummated.

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[1] Defendant states in its brief on appeal that although the 1996 agreement refers to Mead, plaintiff was actually leasing the land from Escanaba at the time of the agreement.

[2] The 1996 agreement refers to Scanlon as ST.

> 11.1 Should ST desire to sell or otherwise dispose of the ST Tower, separate from selling station . . . , MPR shall have the right of first refusal to purchase the ST Tower at fair market value.
>
> 11.2 Should ST desire to sell its station, this Agreement shall be part of the sale and the terms and conditions herein shall be part of any such sale agreement.
>
> * * *
>
> 14. Each provision of this Agreement is intended to be severable. If any term or provision hereof is illegal, or invalid for any reason whatsoever, such illegality or invalidity shall not affect the validity of the remainder of the Agreement. . . .

In July 1996, Escanaba again leased the land to plaintiff. The lease contained a ten-year term. In 2004, Scanlon sold its assets to defendant. Defendant does not dispute that it is Scanlon's assignee and assumed all of Scanlon's benefits and obligations under the 1996 agreement. In July 2006, plaintiff's land lease expired by its terms. The following month, defendant, rather than plaintiff, leased the land, which, apparently, Escanaba had conveyed to Heartwood Forestland Fund. The parties continued to use the tower and building as before.

In 2007, plaintiff filed suit against defendant for the electricity costs defendant was required to pay under the 1996 agreement. In its answer and counterclaim, defendant asserted that plaintiff's claim failed as a matter of law because plaintiff no longer had any interest in the land, rendering the 1996 agreement void and unenforceable. Plaintiff then filed a first amended complaint seeking defendant's share of the cost of road repairs necessitated by the installation of separate utility meters. In 2008, the parties filed motions for summary disposition.

In a July 2, 2009, opinion and order, the trial court granted plaintiff's motion for summary disposition under MCR 2.116(C)(9) and (C)(10) with regard to electricity costs, but denied the motion with regard to road repair costs, finding that a material question of fact existed on that issue. The court denied defendant's motion for summary disposition. Thereafter, the parties agreed to award plaintiff 45 percent of the electricity costs in dispute, plus costs and interest, and plaintiff agreed to waive its claim for road repair costs. The trial court entered a judgment to that effect on September 1, 2009.

II

On appeal, defendant does not challenge the judgment awarded plaintiff pursuant to the parties' stipulation. Rather, defendant challenges the trial court's conclusion in its July 2, 2009, opinion and order that the portions of the 1996 agreement pertaining to the parties' personal property continued to be effective after July 31, 2006, when plaintiff's land lease expired. Defendant asserts that the 1996 agreement was merely a sublease for land between plaintiff and Scanlon, and that once the underlying lease expired, the entire 1996 agreement was no longer effective. Thus, according to defendant, it should not now be required to provide plaintiff with rent-free use of its tower as required under the 1996 agreement. We, however, agree with the trial court.

Plaintiff moved for summary disposition under MCR 2.116(C)(9) and (C)(10), and defendant requested summary disposition under MCR 2.116(I)(2). A grant or denial of summary disposition is reviewed de novo to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(9) tests the legal sufficiency of a defense by the pleadings alone. *Slater v Ann Arbor Public Schools Bd of Ed*, 250 Mich App 419, 425; 648 NW2d 205 (2002). All well-pleaded factual allegations are accepted as true, and summary disposition is appropriate only "when the defendant's pleadings are so clearly untenable that as a matter of law no factual development could possibly deny the plaintiff's right to recovery." *Id*. at 425-426. A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Maiden*, 461 Mich at 119-120. All admissible evidence submitted by the parties is reviewed in the light most favorable to the nonmoving party and summary disposition is appropriate only when the evidence fails to establish a genuine issue regarding any material fact. *Id*.; MCR 2.116(G)(6). Under MCR 2.116(I)(2), summary disposition is properly granted in favor of the nonmoving party if that party, rather than the moving party, is entitled to judgment. *DaimlerChrysler Corp v Wesco Distribution, Inc*, 281 Mich App 240, 245; 760 NW2d 828 (2008).

The interpretation of a contract, including whether the language of a contract is ambiguous, is a question of law that we review de novo on appeal. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003). An unambiguous contract must be enforced according to its terms. See *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51-52; 664 NW2d 776 (2003). Interpretation of an ambiguous contract is a question of fact that must be decided by a jury. *Klapp*, 468 Mich at 469. A contract is ambiguous if the words may reasonably be understood in different ways or the provisions irreconcilably conflict with each other. *Id*. at 467.

Defendant's assertion that the 1996 agreement ceased being effective when plaintiff's land lease expired in July 2006 is premised on the conclusion that the 1996 agreement was nothing more than a sublease for land. At the time of the 1996 agreement, plaintiff was leasing the land on which the tower and building were located. Plaintiff agreed to sublease the land to Scanlon so that Scanlon could construct the new tower. In July 2006, plaintiff's lease expired and in August 2006, defendant, Scanlon's assignee, began leasing the land. Defendant correctly points out the general rule that a sublease depends upon the validity of the main lease and, therefore, that a sublessee's right to leased premises terminates with the right of the sublessor. See 2 Cameron, Michigan Real Property Law (3d ed), § 20.36, p 1132, citing *City of Hamtramck v Roesink*, 286 Mich 65; 281 NW 539 (1938).

We agree with the trial court, however, that the 1996 agreement "is more than simply a sublease dealing with the real property which the transmission facility occupies. [It] also deals with the parties' rights and obligations regarding their personalty." The trial court noted and defendant acknowledges that the tower and building constitute personalty. As explained by this Court in *Wycoff v Gavriloff Motors, Inc*, 362 Mich 582; 107 NW2d 820 (1961):

> "It is a general rule that buildings erected on the lands of another under leave or license so to do, in furtherance of the purposes of the permissive use and occupation, remain personal property and may be removed by the lessee or licensee at any time during his occupancy, or, if such occupancy or right of

> occupancy terminate on a contingency, within a reasonable time thereafter." [*Id.* at 588, quoting *McClintic-Marshall Co v Ford Motor Co*, 254 Mich 305, 321; 236 NW 792 (1931).]

Defendant argues that although the tower and building constitute personalty, the ownership of those structures transferred to the owner of the land when plaintiff's land lease expired in July 2006, and that defendant thereafter assumed ownership of the structures once it leased the land the following month. In so arguing, defendant relies on a provision in plaintiff's 1996 lease with Escanaba, which provided that structures or personal property on the land that were not removed within 60 days of the expiration of the lease would be deemed abandoned and become the property of the landlord. We note, however, that defendant ignores the earlier portion of the same provision, which requires the landlord to demand the removal of structures or personal property before such would be deemed abandoned. Defendant has not presented any evidence that the owner of the land has, at any time, demanded that the tower or building be removed.

Regardless, while plaintiff's land lease expired in July 2006, rendering ineffective plaintiff's sublease "to ST for ST's use for constructing the new ST Tower," defendant provides no support for its assertion that the portions of the 1996 agreement pertaining to the parties' use of one another's personalty, including plaintiff's use of the tower, are also rendered ineffective. Paragraph seven of the agreement provides that plaintiff's "*lease* of the ST Tower . . . shall be for the life of the ST tower and any replacement towers and shall survive any disposition by ST of the ST tower," just as "ST's use of the MPR Building shall be for the life of the MPR Building and any replacement buildings and shall survive any disposition by MPR of the MPR Building" (emphasis added). The agreement further provides that "ST will provide 24 hour access to MPR and its agents to the ST Tower," and in like fashion "MPR will provide 24 hour daily access to the MPR Building to ST and its agents." These unambiguous provisions provide plaintiff with a lease to use defendant's tower, including 24-hour access to the tower, for the life of the tower and any replacement towers.

Paragraph 7.1 of the 1996 agreement, wherein the parties agreed that "MPR shall offer to ST its lease of land from Mead Paper Company in the event MPR should cancel its lease with Mead Paper Company" indicates that the parties anticipated the possible transfer of the land lease, with no indication that a lease transfer would terminate their agreement with respect to the mutual use of one another's personal property on the premises. Significantly, the agreement also provides, in paragraph 14, that each provision of the agreement "is intended to be severable. If any term or provision hereof is illegal, or invalid for any reason whatsoever, such illegality or invalidity shall not affect the validity of the remainder of the [a]greement." Thus, pursuant to the unambiguous terms of the agreement, the provisions regarding plaintiff's tower lease remain effective.

Considering the unambiguous terms of the 1996 agreement, which grant plaintiff the right to rent-free use of defendant's tower, we need not address the trial court's statements regarding the "spirit" of the agreement and the equity of the arrangement between the parties.

Affirmed.

/s/ William B. Murphy
/s/ Jane M. Beckering
/s/ Michael J. Kelly