

STATE OF MICHIGAN
COURT OF APPEALS

COMMUNICATION ENHANCEMENT, LLC,

Plaintiff/Counter-
Defendant/Appellant/Cross-
Appellee,

v

T6 UNISON SITE MANAGEMENT, LLC,

Defendant/Counter-
Plaintiff/Appellee/Cross-Appellant,

and

DEBRA K. MCBRIDE, a/k/a DEBORAH
MCBRIDE,

Defendant-Appellee.

UNPUBLISHED

May 22, 2012

No. 303657

Huron Circuit Court

LC No. 2010-004424-CK

Before: SERVITTO, P.J., and CAVANAGH and FORT HOOD, JJ.

PER CURIAM.

Plaintiff, Communication Enhancement, LLC, appeals as of right the trial court order granting summary disposition in favor of defendant, T6 Unison Site Management, LLC, and dismissing its complaint in its entirety and, in addition, granting summary disposition in T6 Union Site Management LLC's favor on its counterclaim against Communication Enhancement, LLC for nonpayment of rent. T6 Union Site Management, LLC cross-appeals from the trial court's order denying its request for attorney fees. We reverse and remand for further proceedings consistent with this opinion.

On November 3, 2000, Debra McBride, Donald McBride and the White Pine Land Company entered into a contract entitled "Site Lease with Option." The contract provided White Pine with the right to occupy a parcel of real property owned by the McBrides for purposes of

transmitting and receiving wireless communication signals and for erecting and operating a wireless communications tower the parcel.¹ Under the lease, White Pine was provided the “right of first refusal” prior to the McBride’s selling their interest in the property to anyone else. White Pine was also permitted to assign its “rights and obligations . . . under th[e] Lease” and “sublease all or any part of the Premises.” The lease, in fact, went through several assignments, and ultimately ended up being assigned to Communication Enhancement, LLC (“CELLC”) in 2003.

T6 Unison Site Management, LLC (“Unison”) is in the business of acquiring communications tower leases. On March 11, 2010, Debra McBride (“Debra”) and Unison entered into a “Wireless Communication Easement Agreement,” in which Debra granted Unison an exclusive easement “in, to, under and over” the property leased to CELLC to transmit and receive wireless communication signals, and to build and operate towers, cables, and other facilities suitable for that purpose. Unison also assumed all of Debra’s rights and obligations under the lease agreement with CELLC. Debra received approximately \$25,000.00 in the transaction.

By letter dated March 9, 2010, Unison informed CELLC that it had entered into the easement agreement with Debra and that Debra had assigned the lease agreement to Unison. The letter included a copy of the easement agreement and instructed CELLC to make all future rent payments to Unison. CELLC responded with a letter indicating that it was exercising its right of first refusal under the lease agreement, and Unison replied that CELLC’s right of first refusal was inapplicable because there was no sale involved. On April 29, 2010, CELLC filed suit against Unison and Debra. CELLC alleged that Debra breached the lease agreement when she entered into the easement agreement, which it claimed violated CELLC’s right of first refusal and rights to exclusive use of the subject parcel of land. CELLC also alleged that Unison tortiously interfered with its contractual relations with Debra. CELLC sought specific performance pursuant to its right of first refusal and declaratory relief. Unison counter-sued against CELLC for breach of contract based upon CELLC’s failure to pay the monthly lease payments to Unison after Debra’s assignment of her rights under the lease agreement to Unison.

Unison moved for summary disposition against CELLC pursuant to MCR 2.116(C)(10). Unison argued that the easement agreement did not trigger CELLC’s right of first refusal, because that right was limited to a “sale of fee simple title.” It also argued that the easement agreement did not violate CELLC’s exclusive use rights, because Debra did not grant Unison the right to use her property for wireless communications purposes during the term of the lease, and that CELLC’s tortious interference claim should fail because CELLC could not establish a breach of the lease agreement. Finally, Unison asserted that it was entitled to summary disposition on its counter-claim, plus attorney fees and costs, because CELLC had failed to pay rent in breach of the lease agreement. The trial court agreed that Unison was entitled to summary disposition on CELLC’s claims and on its own counter-claim, and entered a judgment

¹ Donald McBride died in 2006, and his interest in the contract passed to Debra. Though Kenneth and Frances McBride had a life estate interest in the eighty-acre parcel of land and were parties to the contract, it is unclear why Kenneth and Frances are not parties to this lawsuit.

in Unison's favor against CELLC in the amount of \$4,235.00, but denied Unison's request for attorney fees and costs. These appeals followed.

On appeal, CELLC first contends that the trial court erred in granting summary disposition in Unison's favor on its breach of contract claim. We agree.

On appeal, a trial court's decision whether to grant a motion for summary disposition is a question of law that is reviewed de novo. *Brown v Brown*, 478 Mich 545, 551; 739 NW2d 313 (2007). A motion under MCR 2.116(C)(10) is properly granted when the proffered evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 552. The construction and interpretation of a contract, including whether an ambiguity exists in it, are questions of law that this Court also reviews de novo. See *Farm Bureau Mut Ins Co v Nikkel*, 460 Mich 558, 563; 596 NW2d 915 (1999); *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 353; 596 NW2d 190 (1999).

A contract must be interpreted according to its plain and ordinary meaning. *Holmes v Holmes*, 281 Mich App 575, 593; 760 NW2d 300 (2008). "The fundamental goal of contract interpretation is to determine and enforce the parties' intent by reading the agreement as a whole and applying the plain language used by the parties to reach their agreement." *Dobbelaere v Auto-Owners Ins Co*, 275 Mich App 527, 529; 740 NW2d 503 (2007). If contractual language is clear and unambiguous, its meaning is a question of law, and courts must interpret and enforce the contract as written. *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 111; 595 NW2d 832 (1999).

Here, Paragraph 1.C. of the "Site Lease with Option" provides as follows:

It is understood and agreed by the parties hereto that for and during the Option Period (as may be extended by Lessee and/or upon the mutual consent of the parties), the Initial Term and all extension periods as may be exercised by Lessee under the Lease, Lessor shall grant to no other party the right to use Lessor's property upon which the Site is located ("Lessor's Property") for the installation and operation of radio or other wireless communications equipment thereupon.

Paragraph 1.D. of the agreement also provided the lessee (now CELLC) with "the sole and exclusive right to occupy the Property . . . for the purposes stated herein . . ." Such purposes are found in paragraph 5 of the agreement, as follows:

5. **USE** of the Site by Lessee shall be for the purpose of, among other things, the transmission and reception of wireless communication signals and for the construction, maintenance, repair, or replacement of a multi-user wireless communications facility by construction of real estate improvements to include buildings, foundations, tower(s) and security fencing and the equipping of the said improvements with antennas, equipment and other related accessories . . .

Under the easement agreement with Unison, Debra "grant[ed], bargain[ed], transfer[ed], and convey[ed]" the following "perpetual" property interest to Unison:

“an exclusive easement in, to, under and over the portion of the Property . . . for the transmission and reception of any and all wireless communication signals and the construction, maintenance, repair, replacement, improvement, operation and removal of towers, antennas, buildings, fences, gates, generators and related facilities . . . and any related activities and uses including those necessary for Unison to comply with its obligations under the [Easement agreement].

The conveyance to Unison appears to be in direct violation of the paragraph 1.C of the lease agreement, in that it clearly grants Unison “the right to use [the property] for the installation and operation of radio or other wireless communications equipment thereupon.” The easement agreement does not indicate that Unison’s rights take effect only after the expiration or termination of the lease, or that Unison’s interest in the property is in any way restricted by CELLC’s rights under the lease agreement. On the contrary, it is clear that Unison acquired the exclusive easement on March 11, 2010, the “effective date” of the easement agreement, and that Unison may use its easement in a number of ways that would be inconsistent with its duties under the lease agreement. That Unison was obligated to follow the terms of the lease agreement has no bearing on whether it acquired the right to use the property for installation and operation of radio or other wireless communications equipment. Unison has the right to use the property for installation and operation of radio or other wireless communications equipment and had that right on the date the easement agreement was signed. And, in fact, Unison was exercising this right, by leasing it to CELLC.² Thus, by entering into the easement agreement, paragraph 1 of the lease agreement was breached. Summary disposition on CELLC’s breach of contract claim in favor of Unison was thus inappropriate. Rather, summary disposition in CELLC’s favor was appropriate on this issue and the easement agreement purporting to give Unison “an exclusive easement in, to, under and over the portion of the Property . . . for the transmission and reception of any and all wireless communication signals and the construction, maintenance, repair, replacement, improvement, operation and removal of towers, antennas, buildings, fences, gates, generators and related facilities . . . and any related activities and uses including those necessary for Unison to comply with its obligations” is void.

CELLC next contends that summary disposition was inappropriate with respect to its claim for specific performance, as its right of first refusal was triggered by the terms of the easement agreement. We disagree.

The lease agreement provides, “[i]t is understood and agreed by the parties hereto that in the event Lessor receives an offer to purchase the Property, Premises Site or Lessor’s Property . .

² Unison asserts that Debra did not sell, and that it did not acquire, the right to use the property for the installation and operation of radio or other wireless communications equipment thereupon. However, Unison is leasing that very right to CELLC. Unison, in fact, states in its brief that it “obtained certain rights from the Easement Agreement specifically to comply with its obligations as landlord under the Lease. . . . These easement rights . . . are essential to CELLC’s continued enjoyment of its rights under the Lease and Unison’s performance of its obligations as CELLC’s lessor.”

. at any time during the Option Period . . . Lessor shall, prior to selling its interest in the Sale Property, first communicate said offer to lessee . . . within seven (7) days from the date of receipt of said offer. Lessee shall have fifteen (15) days from the date of receipt of said notice to match the purchase price offered to Lessor.” While “purchase” is not defined in the lease agreement, the term is defined in Black’s Law Dictionary (7th ed.) as “the act or an instance of buying,” and “the acquisition of real property by one’s own or another’s act (as by will or gift) rather than by descent or inheritance.” The “Property” referenced in the lease agreement is the 80 acre parcel owned by Debra. The “Premises Site” consists of real property on the 80 acre parcel comprised of approximately 151,200 square feet of land and space required for foundations, equipment shelters, guy anchors and/or cable runs to connect CELLC’s equipment and antennas as set forth in an exhibit attached to the lease.

It is undisputed that Unison contracted for an easement over the subject property. An easement is the right to use the land of another for a specified purpose. *Schadewald v Brule*, 225 Mich App 26, 35; 570 NW2d 788 (1997). An easement does not displace the general possession of the land by its owner, but merely grants the holder of the easement qualified possession only to the extent necessary for enjoyment of the rights conferred by the easement. *Id.* An easement, then, is not the *acquisition* or *buying* of real property, but merely the right to *use* of another’s real property. The distinction is significant. Debra’s obligation to present CELLC with the right of first refusal would be triggered “in the event Lessor receives an offer to purchase the Property, Premises Site or Lessor’s Property.” There is no indication that Unison presented Debra with an offer to purchase the property or premises site. While it did offer to purchase an easement and Debra’s interest in the lease, and thus, *an interest* in the property, that is not the same as an offer to purchase “the” property.

It is the bedrock principle of American contract law that “parties are free to contract as they see fit, and the courts are to enforce the agreement as written absent some highly unusual circumstance, such as a contract in violation of law or public policy.” *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51; 664 NW2d 776 (2003). And, “[c]onsistent with construction of contracts in general, rights of first refusal are to be interpreted narrowly.” *LaRose Mkt, Inc v Sylvan Ctr, Inc*, 209 Mich App 201, 205; 530 NW2d 505, 507 (1995). Had the parties intended that the right of refusal provision be triggered on an offer to convey any interest in the property, the contract could have been worded accordingly. Because the parties chose to use more specific terms, i.e., “purchase” and “the” property or premises site, we enforce the contract as written. Unison made no offer to purchase the property or premises site such that CELLC’s right of first refusal was triggered.

While CELLC directs us to various out of state cases to contend that a right of first refusal may be triggered by a “sale” of less than a fee simple interest, we reiterate that when the language of a contract is clear and unambiguous, “the role of the court is limited to determining the intention of the parties from the four corners of the contract and in accordance with normal usage of the English language.” *Smith, Hinchman & Grylls Associates, Inc v Wayne County Road Comm’rs*, 59 Mich App 117, 127; 229 NW2d 338 (1975); *Old Kent Bank v Sobczak*, 243 Mich App 57, 63; 620 NW2d 663 (2000). To accept the CELLC’s argument would require this Court to find the contract to be ambiguous and to look beyond its four corners to determine the parties’ intentions. We will not turn contract law on its ear to do so.

CELLC next claims that Unison was not entitled to summary disposition on CELLC's claim of tortious interference. We agree.

While it is not entirely clear on what basis the trial court dismissed this claim, it presumably dismissed the claim because of its determination that there was no breach of the lease agreement, which is then fatal to a claim of tortious interference with a contract. Tortious interference with a contract exists when a third party to a contract, knowing of the contract, unjustifiably induces a breach of the contract. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 382; 689 NW2d 145 (2004).

[O]ne who alleges tortious interference with a contractual or business relationship must allege the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights or business relationship of another. A wrongful act per se is an act which is inherently wrongful or an act that can never be justified under any circumstances. If the defendant's conduct was not wrongful per se, the plaintiff must demonstrate specific, affirmative acts which corroborate the unlawful purpose of the interference. [*Badiee v Brighton Area Schs*, 265 Mich App 343, 367; 695 NW2d 521 (2005) (internal quotation marks and citations omitted).]

Our Supreme Court has held that "the intentional and knowing inducement of a party to break his contract with another party is a wrongful act, and actionable as such, unless reasonable justification or excuse can be shown." *Greenwald v Greenwald*, 480 Mich 1158; 746 NW2d 620 (2008).

Here, in order to survive Unison's motion for summary disposition, CELLC was required to put forth evidence that, at a minimum, created a factual question concerning whether Unison committed a wrongful act that had no justification, and did so with malice and the intent to induce Debra to breach the lease agreement with CELLC, or that Unison committed a lawful act with malicious intent to induce Debra to breach the lease agreement with CELLC. While we do find that Debra, through the easement granted to Unison, breached the lease agreement with CELLC, there remains a question of fact whether Unison unjustifiably induced a breach of the lease.

Given that within the easement agreement was an assignment of the lease agreement between Debra and CELLC, an intent on Unison's part to cause Debra to breach the lease agreement would ultimately disadvantage Unison. On the other hand, CELLC presented documentary evidence establishing that Unison entered into the easement agreement having had full knowledge of the existing lease agreement and of the specific language contained therein, including the exclusive use provision. Despite knowledge of such language, Unison drafted an easement agreement contrary to the lease provisions and it received financial gain from its easement agreement. And, obtaining the rights to and control over communication towers appears to be part of the business in which Unison is engaged. Reasonable minds could thus differ as to whether Unison entered into the easement agreement with malice and unjustified in law for the purpose of invading the contractual rights of CELLC, and the trial court thus erred in granting Unison summary disposition on this issue.

CELLC next asserts that the trial court erred in finding in Unison's favor on its counter-claim for CELLC's non-payment of rent. The trial court's finding on this issue was premised on its erroneous conclusion that there was no breach of the lease. Because we conclude that the lease was, in fact, breached, and the easement is void, Unison has no enforceable right to receive payment of rent from CELLC. Therefore, the trial court's ruling on this issue was also in error.

Finally, on cross-appeal, Unison argues that the trial court erred in its interpretation and application of the lease agreement attorney fee provision. According to Unison, the lease agreement provided that the prevailing party in any action to enforce the terms of the lease "shall" be awarded attorney fees and the trial court abused its discretion when it denied Unison's motion for attorney fees.

The lease agreement contains the following provision regarding attorney fees for enforcement:

The prevailing party in any action or proceeding in court to enforce the terms of this Lease shall be entitled to receive its reasonable attorneys' fees and other reasonable enforcement costs and expenses from the non-prevailing party.

In the immediate case, there were two actions or proceedings brought to enforce the terms of the lease agreement. The first is CELLC's action against Debra for her breach of the lease agreement. The second is Unison's action against CELLC for breach of the lease agreement. As to the first, as discussed above, Debra breached the exclusive use provision of the lease agreement. CELLC brought an action to enforce those provisions, has now prevailed, and thus "shall be entitled to receive its reasonable attorneys' fees and other reasonable enforcement costs and expenses from the non-prevailing party."

As to the second, Unison is not entitled to attorney fees because it is not a prevailing party in its breach of the lease agreement suit. The easement agreement is void such that Unison does not assume Debra's rights under the lease agreement or otherwise become a party to that agreement.

Reversed and remanded for entry of summary disposition in CELLC's favor on its claim of breach of contract. On remand, the trial court is directed to void the easement agreement, determine reasonable attorneys' fees and other reasonable enforcement costs and expenses to be awarded to CELLC, and to conduct any other proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood