STATE OF MICHIGAN

COURT OF APPEALS

EQUITY PROPERTIES AND DEVELOPMENT COMPANY,

Plaintiff-Appellant,

v

MICHAEL ENTINGER, ROBERT SHIRK, ENTINGER & SHIRK and MICHAEL ROBERTS, INC.,

Defendants-Appellees.

UNPUBLISHED
December 27, 1996

No. 188302

Lenawee County
LC No. 94-006045

Before: McDonald, P.J., and Murphy and J. D. Payant*, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(10) in this breach of contract action. We affirm in part, reverse in part and remand for further proceedings.

Plaintiff and defendants entered into a fifteen year commercial lease agreement for space in plaintiff's shopping mall. The lease provided that defendants would pay as additional rent a minimum of $1,137.50 up to a maximum of $1,625 per year towards plaintiff's total cost of operating the commons areas of the mall (CAM charges) during the initial term. However, if defendants exercised their renewal option, the lease provided that they would pay plaintiff a proportionate share of plaintiff's total CAM expenses. The lease further provided that plaintiff "shall" notify defendants of their proportionate share of the prior year's actual CAM charges and the estimated CAM charges for the current lease year "on or before" June 1 of each year of the lease period. After failing to notify defendants of any additional charges due from them and accepting annual payments in the amount of the $1,625 defendants had paid during the initial lease, plaintiff sent defendants a notice on July 21, 1992, requesting that they pay CAM charges for 1990 through 1992 pursuant to the renewal clause. Subsequently, plaintiff sent several

* Circuit judge, sitting on the Court of Appeals by assignment.

other statements demanding that defendants pay CAM charges for other years -- one which revised the 1991 CAM charges upward and three for the years 1993, 1994, and 1995, respectively. When defendants refused to pay the charges, plaintiff brought suit. Defendants moved for summary disposition pursuant to MCR 2.116(C)(8), asserting laches, equitable estoppel and waiver. The trial court granted summary disposition in favor of defendants pursuant to MCR 2.116(C)(10), finding that plaintiff's failure to comply with the notice provision contained in the lease barred any recovery.

Plaintiff first contends that summary disposition was inappropriate because genuine issues of material fact remained with regard to whether the notices sent by plaintiff sufficiently complied with the notice provision in the lease agreement. We review a trial court's decision whether to grant summary disposition de novo. *Stehlik v Johnson (On Rehearing)*, 206 Mich App 83; 520 NW2d 633 (1994). The granting of summary disposition is appropriate when "[e]xcept as to the amount of damages, there is no genuine issue of material fact, and the moving party is entitled to judgment of partial judgment as a matter of law." MCR 2.116(C)(10). In order to merit the grant of summary disposition under MCR 2.116(C)(10), a court must have considered the pleadings, affidavits, depositions, admissions and other documentary evidence in favor of the nonmovant, and found that no genuine issue of material fact existed. *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186; 540 NW2d 297 (1995); *Weeks v Board of Trustees, Detroit General Retirement System*, 160 Mich App 81; 408 NW2d 109 (1987). Here, instead of citing to any factual disputes that might have remained, plaintiff's argument centered on the trial court's interpretation of the notice provision.

Plaintiff also argues that the trial court erred, as a matter of law, when it determined that plaintiff had waived its right to collect any of the unpaid CAM charges from defendants. Plaintiff further contends that the doctrine of substantial performance applies to leases and thus, summary disposition was inappropriate because in several instances plaintiff substantially complied with the notice provision by sending notices only a few days after the required notice date. We agree with plaintiff that the doctrine of substantial performance applies to lease agreements. *Gordon v Great Lakes Bowling Corporation*, 18 Mich App 358; 171 NW2d 225 (1969). Nevertheless, neither *Gordon* nor any other Michigan case offers guidance on how the doctrine of substantial performance is to be applied where a lessor fails to timely notify his tenant of increased payments that the lessor could have otherwise properly charged the tenant under the lease. Indeed, there is no Michigan case that addresses the issue as framed by plaintiff, aside from the application of the doctrine. A search of the case law from several other jurisdictions, however, indicates that the same issue or issues sufficiently similar to the instant matter are instructive in deciding this issue.

In *Winfield Capital Corporation v Mahopac Auto Glass, Inc*, 208 AD2d 715; 617 NYS2d 499 (1994), the court held that where a lessor failed to notify the tenant of additional rents due under a tax escalator contained in the lease agreement, it was barred from recovering those additional rents. In *Zarlengo v Farrer*, 683 P2d 1208, 1209 (Colo App, 1984), the court held that where the "landlords accepted the amount of rent paid by [the] tenants without notice that the base rent, as calculated by a formula set forth in the lease, had increased[,] [and] [t]he landlords neither object to the amount paid nor attempted to enforce the rental provision of the lease until the tenants notified [the] landlords of their intent to assign the lease[,]" the landlords had effectively waived their right to the additional rents and in

Waters v Taylor (On rehearing), 527 So 2d 139 1080-1081 (Ala App, 1988), the court held that "[t]he lessors' course of conduct consisting of the length of delay in making any request for a rent increase and in failing to respond to the lessee's correspondence [sent] [shortly] [after] [the] [lease] [commenced], [was] inconsistent with any other intention but to waive the right to adjust the lessee's rent for th[e] [fifty-eight] [month] period [of] [delay]."

In this case, we find *Winfield*, *supra*, is the most factually similar to the instant case and its conclusion is consistent with most of the other cases.

In *Winfield*, supra, the New York Supreme Court, Appellate Division, Second Department affirmed the trial court's granting of summary disposition in favor of the defendant, tenant, dismissing the plaintiff, landlord's, complaint seeking damages for an alleged breach of a lease agreement. The defendant and the original landlord entered into a ten year lease of certain real property that commenced on February 1, 1980. The lease provided, in part, that:

> [i]n addition to the Annual Rent set forth herein, [the] [defendant] agrees to pay to [the] Landlord one-half of all real estate taxes billed against the entire property (including the gas station) to the extent same exceed the real estate taxes billed for the calendar year 1979. . . . For the purposes of this paragraph, [the] [defendant] and [the] Landlord agree that the taxes billed against the entire property for calendar year 1979 are in the amount of $7,369.16. Landlord shall notify [the] [defendant] prior to February 1, 1981 and prior to February 1 of each succeeding year of the amount of taxes billed and of [the] [defendant]'s share thereof. [The] [defendant] shall pay its share to [the] Landlord on or before February 15, 1981 and on or before February 15 of each succeeding year. [*Id*., 617 NYS2d 500 (Ballenta, J., dissenting).]

Four years after the lease commenced, the original lessor sold the premises to a third party who assigned the rents to the plaintiff. The plaintiff, his assignor and the original landlord all failed to give the defendant notice prior to February 1 of each year of the ten year lease, that additional rents were owed under a tax escalator clause in the lease. When the defendant failed to pay the additional rents after being notified by the plaintiff approximately one year after the end of the lease, the plaintiff brought suit to recover the payments. The trial court denied the plaintiff's motion for summary disposition but granted the defendant's motion, based on the equitable defenses of waiver, laches, and equitable estoppel, "because the [plaintiff] had not given the [defendant] notice of the additional amounts due . . . as required by the lease." *Winfield*, *supra*, 617 NYS2d 499. On appeal by the plaintiff, the appellate court affirmed the trial court's decision for the reason that "the [plaintiff] fail[ed] to satisfy a condition precedent to the [defendant]'s obligation to pay the additional rents." *Id*.

Similarly, the lease agreement in the instant case required plaintiff to give defendants notice by a certain date -- June 1 of each year of the lease -- of their share of plaintiff's total CAM expenses, estimated and actual. In addition, like the plaintiff in *Winfield*, the instant plaintiff failed to comply with the notice provision. Rather, plaintiff delayed the notices until nearly fifty days after the sixth year of the

renewal period had begun. Even then, the first two notices were sent after June 1 and covered periods that should have been billed at least one year prior to the mailing date. Therefore, because there was no factual dispute that plaintiff did not comply with the notice povision of the lease with respect to the years from 1990 through June 1992, summary disposition of plaintiff's claim for CAM charges for those years was appropriately granted. *Winfield supra*. However, plaintiff satisfied the notice requirement by sending notice to defendants prior to June 1 of the years from 1993 through 1995, and thus, summary disposition was not appropriate for those years. We remand for a hearing to determine plaintiff's damages post June 1992, if any.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No costs to any party.

/s/ Gary R. McDonald
/s/ William B. Murphy
/s/ John D. Payant