STATE OF MICHIGAN

COURT OF APPEALS

EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Plaintiff-Counterdefendant-Appellee,

v

ELIAS BROTHERS RESTAURANTS, INC.,

Defendant-Counterplaintiff-Appellant.

UNPUBLISHED
December 18, 1998

No. 203631
Oakland Circuit Court
LC No. 96-511554 CH

Before: Murphy, P.J., and Fitzgerald and Gage, JJ.

PER CURIAM.

Defendant appeals as of right from the judgment for plaintiff in the amount of $180,851.89 and attorney fees in the amount of $6,140.30. We affirm.

Defendant owned and operated a Big Boy Restaurant in Eastland Mall. Plaintiff operated the mall. On August 10, 1988, defendant and plaintiff entered into a lease agreement for space adjacent to entrance number four of the mall. The lease terminated on January 1, 1999. Defendant was advised in August 1995 that the parking lot for entrance number four had been sold to a new mall tenant, Target, who was moving into the space previously occupied by Kohls. In addition, defendant was advised that Target planned on reconfiguring the parking lot so that traffic would be directed toward Target's entrance and away from entrance number four. Defendant advised plaintiff that this plan would adversely[1] affect defendant's business and constituted a breach of the lease.

After the close of business on August 13, 1995, the day before construction was scheduled to begin on the parking lot, defendant temporarily closed the restaurant and ceased paying rent and other monthly charges. Defendant advised plaintiff that it would consider opening the restaurant once it was demonstrated that Target's arrival would benefit the sales at defendant's restaurant. In January 1996, plaintiff evicted defendant and then filed an action seeking lost rents, past and future, under the lease. Defendant filed a counterclaim asserting that plaintiff

constructively evicted defendant. Following a bench trial, the trial court found in favor of plaintiff.

On appeal, defendant argues that the trial court erred in failing to specifically delineate its findings of fact and conclusions of law and in ruling that plaintiff's reconfiguration of the parking lot did not permanently damage defendant's business nor constitute a breach of the lease. This Court will not disturb the trial court's findings of facts unless clearly erroneous. MCR 2.613(C). We review questions of law de novo. *Frericks v Highland Twp*, 228 Mich App 575, 583; 579 NW2d 441 (1998).

In actions tried without a jury, the trial court must make specific findings of fact and state separately its conclusions of law as to contested matters. MCR 2.517(A)(1); *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 176; 530 NW2d 772 (1995). The findings and conclusions as to contested matters at a bench trial are sufficient if they are "'[b]rief, definite, and pertinent,' and it appears that the trial court was aware of the issues in the case and correctly applied the law, and where appellate review would not be facilitated by requiring further explanation." *Triple E*, *supra*, citing MCR 2.517(A)(2).

The construction of language in a contract that is clear is one of law for the court. *G & A Inc v Nahra*, 204 Mich App 329, 330; 514 NW2d 255 (1994). However, when the contract's language is capable of two different interpretations, a court must determine what the parties' agreement is and enforce it. *Id.* The trial court stated the following in its opinion:

> Defendant argues that it was constructively evicted from the premises when Plaintiff closed Entrance #4 and reconfigured the parking lot in a way that "permanently materially adversely" affected Defendant's business, in violation of the Rider to Article 27 of the Lease. The Court finds that Defendant has failed to show that any of Plaintiff's actions had an adverse impact on Defendant's business.
>
> The Court first notes that Plaintiff had an absolute right under Article 12(B) of the Lease to close temporarily Entrance #4. The temporary closing of Entrance #4 did not violate the Rider to the Lease because it did not permanently affect Defendant's business.
>
> As to the parking lot reconfiguration, the Court notes that pursuant to Article 12(B) and Article 27 of the Lease, Plaintiff had the right to change the location and arrangement of the parking lots. Although Defendant argues that the reconfiguration of the parking lot adversely affected its business, Defendant vacated the premises before Plaintiff had taken any action.

We conclude that the trial court was correct in finding that plaintiff had the right to temporarily close entrance number four and reconfigure the parking lot. The contractual language of the lease was clear. Article 12(B) of the lease specifically states the following, in relevant part:

> Landlord shall have the right to change the location and arrangement of parking areas and other Common Areas to enter into modify and terminate easements and other agreements pertaining to the use and maintenance of the Common Area; . . . to close temporarily any or all portions of the Common Area.

> Defendant also argues that even if Article 12(B) authorized plaintiff to temporarily close entrance number four and modify the parking lot, the rider to Article 27 of the lease should have prevented it from engaging in such action. The rider to Article 27 states:

> Notwithstanding the foregoing, Landlord agrees that in exercising its rights under this Article 27, Landlord shall not permanently materially adversely affect Tenant's business in the Premises.

The trial court's opinion, however, shows that it was aware of defendant's allegation that reconfiguring the parking lot would permanently, materially, and adversely affect its business and that it did not find sufficient evidence to support this claim. We agree. Defendant showed through the testimony of its Chief Operating Officer that when the door to entrance number four was locked, its business suffered. However, in late August 1995, when plaintiff locked the door to entrance number four, it was understood by all parties to be a temporary situation. Thus, this testimony did not support defendant's claim that the reconfiguration of the parking lot would permanently, materially, and adversely affect its business. Further, defendant did not provide any evidence to rebut plaintiff's argument that any loss of business that defendant may have suffered, as a result of the arguably fewer people who would enter through entrance number four, would be offset by the increase in volume of people at the mall.

Therefore, we find that the trial court properly found that plaintiff was authorized under the lease to temporarily close both entrance number four and the parking lot, and to sell and allow the parking lot to be reconfigured.

Defendant also argues that it was constructively evicted as a result of the sale of the entrance number four parking lot and the planned reconfiguration of the parking lot. Constructive eviction occurs when a tenant is forced to abandon the premises because an action by the landlord deprived the tenant of beneficial enjoyment of the premises to which he is entitled under the lease. *Briarwood v Faber's Fabrics, Inc*, 163 Mich App 784, 790 n 2; 415 NW2d 310 (1987). However, defendant presented no evidence to contradict plaintiff's evidence that the increase in customers in the mall resulting from the opening of the Target store would offset the alleged decrease of customers that would patronize defendant's restaurant. Therefore, we hold that defendant was not constructively evicted because it was not deprived of the enjoyment of the premises to which it was entitled to under the lease.

Defendant also argues on appeal that it was justified in closing its business and ceasing payment of rent and other charges by the doctrine of anticipatory breach and avoidable consequences. However, since defendant raises these defenses for the first time on appeal, they

were not preserved for appellate review and we decline to address them. *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993); *Phinney v Perlmutter*, 222 Mich App 513, 544; 564 NW2d 532 (1997).

Affirmed.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Hilda R. Gage

[1] Defendant pointed to an occasion in early August when the door to entrance number four had been locked for several hours and defendant did virtually no business until it was reopened.