STATE OF MICHIGAN

COURT OF APPEALS

BORDERS, INC., BORDERS PROPERTIES, INC., and WALDEN PROPERTIES, INC.,

Plaintiffs-Appellees,

V

AGREE LIMITED PARTNERSHIP, AGREE REALTY CORPORATION, ANN ARBOR STORE NO. 1 LLC, PHOENIX DRIVE LLC, BOYNTON BEACH STORE NO. 150 LLC, LAWRENCE STORE NO. 203 LLC, TULSA STORE NO. 135 LLC, OKLAHOMA CITY STORE NO. 151 LLC, OMAHA STORE NO. 166 LLC, TULSA STORE NO. 264 LLC, and INDIANAPOLIS STORE NO. 16 LLC,

Defendants-Appellants.

UNPUBLISHED
July 9, 2002

No. 238628
Washtenaw Circuit Court
LC No. 01-000883-CZ

Before: Bandstra, P.J., and Hoekstra and O'Connell, JJ.

PER CURIAM.

Defendants appeal as of right the trial court's order granting plaintiffs summary disposition, and denying defendants the same, on plaintiffs' complaint for declaratory relief as to plaintiffs' obligations under a number of contracts concerning financing of plaintiffs' retail store sites. We affirm.

I. Facts and Procedural History

Plaintiff Borders operates a number of retail music, book, and video stores throughout the United States.[1] Since 1995, defendant Agree Limited Partnership has developed several such stores for Borders by finding and acquiring commercial real estate sites on which it would construct a facility suitable for Borders' stores. Financing for the acquisition and development of these sites was initially provided to Borders on a temporary basis, with the understanding that

[1] According to the parties, plaintiffs Borders, Inc., Waldenbooks Properties, Inc., and Borders Properties, Inc. are similarly situated for purposes of this appeal. Accordingly, we refer to each of these plaintiffs collectively as either "plaintiff" or "Borders."

Borders would acquire permanent financing of such costs upon completion of construction. Initially, permanent financing of the stores developed by Agree was provided by Agree under agreements wherein Borders would lease the store site from Agree, with the cost of Borders' rent reflecting Agree's costs in providing permanent financing for the site. In the fall of 1995, however, Borders determined that it could lower its rental costs if its ability to obtain development capital was supported by the credit of Borders' parent company, Borders Group, Inc.[2] Thus, in November 1995, Borders entered into a lease financing agreement with Bankers Trust Company under which loans guaranteed by Borders Group, Inc. were to be made to special purpose entities established by the stores' developers, including Agree.[3]

The financing provided by Bankers Trust, however, is temporary and expires in October 2002. Borders must therefore still arrange for permanent financing of any stores developed under the agreement with Bankers Trust. As was the case before Bankers Trust's involvement, the costs of such permanent financing will be reflected in any lease negotiated for the later developed stores. Therefore, the cheaper Borders is able to obtain permanent financing, the lower its rental costs will be.

According to the parties, there are two options for the permanent financing of Borders' stores: a public offering or a private placement. With a public offering, funding would be obtained through an underwriter by a sale to the public of debt securities that have been rated by a rating agency, such as Moody or Standard & Poor, and registered with the Securities and Exchange Commission. With a private placement, however, debt securities would be sold directly to institutional investors or other qualified purchasers without the need for underwriting, rating, or registration. Because it does not require underwriting, rating, or registration, a private placement is the less costly of the two financing options.

At the time Borders was arranging for temporary financing from Bankers Trust, Agree was in the process of developing several sites for Borders and was contemplating the development of additional sites. To resolve how temporary and permanent financing of these sites would work in light of the Bankers Trust agreement, Borders and Agree entered into an agreement under which the parties agreed that, with respect to those sites for which temporary financing was provided by Bankers Trust, Agree would have a right of first refusal to provide permanent financing on the same terms as those that could be obtained by Borders.

This agreement formed the basis for nine separate financing agreements, each concerning nine new sites developed by Agree, executed by Border and Agree between January 1996 and December 1997. Each of these agreements contains essentially the same right of first refusal as found in the November 1995 agreement between the parties:

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[2] Borders apparently believed that, if backed by Borders Group, Inc., it could obtain more favorable terms for the temporary and permanent financing of its stores than could be obtained by the developers with which it worked, and thus ultimately cut the cost of leasing the stores back from its developers.

[3] With the exception of Agree Limited Partnership and Agree Realty, each of the defendants in this matter are such special purpose entities.

> **LESSOR FINANCING FOR THE PROPERTY.** It is contemplated that the Lessor Financing will be provided through a public offering of securities issued by either Borders or Borders Group, Inc., which securities are secured by mortgages or deeds of trust on properties upon which a Borders retail store is located ("Borders Debt Placement"). Notwithstanding the provisions of Article XXI of the Lease to the contrary, Partnership shall have the first option to provide financing to the LLC . . . .[4]

According to Borders, at the time each of these financing agreements were executed, a public offering appeared to be the most likely method of obtaining permanent financing for the subject stores. However, because such financing would not be necessary for a number of years, during which time the circumstances surrounding such a decision were subject to change, the parties described a public offering merely as the method of financing "contemplated" by the parties. During discussions between the parties in 1998, however, Agree took the position that the agreements required that permanent financing be obtained exclusively through a public offering, and thus precluded Borders from seeking such financing through a private placement. Borders disagreed with this contention and thus, when negotiations for the development of two new stores commenced, the parties ensured that the financing agreements clearly stated that either method of financing was permissible.[5] Nonetheless, as a result of Agree's position that the first nine agreements did not permit private placement financing, Borders initial efforts to obtain such financing for those stores were apparently hampered. Faced with the expiration of its temporary financing in October 2002, Borders filed a complaint seeking a declaratory judgment regarding the permissible methods of permanent financing under the initial nine agreements between the parties.

Without first seeking discovery, both parties filed motions for summary disposition under MCR 2.116, seeking review of the contract language in dispute. In challenging Borders ability to obtain permanent financing through a private placement, Agree essentially argued that the term "contemplated," as used in the section quoted above, evidenced that the parties' intent under the agreements was that a public offering would be the exclusive method of obtaining permanent financing for the subject stores. In support of this argument, Agree noted that the later two agreements clearly set forth a contrary intent using the same "contemplated" language. In response, Borders argued that the term "contemplated" was specifically placed into the agreement to protect against a change in circumstance, and that to interpret the term "contemplated" to mean "intend,"

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[4] See note 6, *infra*.

[5] These later agreements provide:

> **LESSOR FINANCING FOR THE PROPERTY**. It is contemplated that the Lessor Financing will be provided through either a Public Offering or a Private Placement (as defined herein, and collectively referred to as a "Borders Debt Placement"). Notwithstanding the provisions of Article XXI of the Lease to the contrary, Partnership shall have the first option to provide financing to the Agree SPE in lieu of the Lessor Financing . . . .

would effectively render that term meaningless, contrary to established rules of contract construction.

Finding that the disputed language was clear and unambiguous, the trial court ruled that when the plain and ordinary meaning of the term "contemplated" is applied, the subject agreements do not limit Borders' ability to obtain financing by means other than a public offering. Accordingly, the trial court granted summary disposition in favor of plaintiffs. This appeal followed.

II. Analysis

Defendants argue that the trial court erred in failing to conclude that, under the terms of the parties' financing agreements, plaintiffs were required to employ a public offering as the exclusive means of obtaining permanent financing for its stores. We disagree.

This Court reviews de novo a trial court's decision regarding a motion for summary disposition in a declaratory judgment action. *Michigan Educational Employees Mut Ins Co v Turow*, 242 Mich App 112, 114; 617 NW2d 725 (2000). The construction and interpretation of an unambiguous contract is a question of law also subject to review de novo. *Morley v Automobile Club of Michigan*, 458 Mich 459, 465; 581 NW2d 237 (1998). The main goal in the interpretation of contracts is to honor the intent of the parties. *Mikonczyk v Detroit Newspapers, Inc*, 238 Mich App 347, 349-350; 605 NW2d 360 (1999). To give effect to such intent, contracts must be interpreted "according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary, and popular sense." *Farm Bureau Mut Ins Co v Stark*, 437 Mich 175, 181; 468 NW2d 498 (1991), overruled on other grounds in *Smith v Global Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999) (citations omitted). After reviewing the disputed language in this case, we conclude that the language is clear and unambiguous, and that the trial court correctly interpreted the language as a matter of law.

As stated previously, the contract language at issue here reads as follows:

> **LESSOR FINANCING FOR THE PROPERTY.** It is ***contemplated*** that the Lessor Financing will be provided through a public offering of securities issued by either Borders or Borders Group, Inc., which securities are secured by mortgages or deeds of trust on properties upon which a Borders retail store is located ("Borders Debt Placement").[6]

In essence, defendants argue that the term "contemplated," as used above, evidences that the parties' intent under the agreements was that a public offering would be the exclusive method of obtaining permanent financing for each of the subject stores.[7] Defendants' argument, however, is not supported by the plain and ordinary meaning of that term.

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[6] Although the agreement respecting plaintiffs' Ann Arbor store is worded somewhat differently, the specific language at issue on appeal – "[i]t is contemplated that" – is the same.

[7] In support of this argument, defendants assert that the parties used the term "contemplated" (continued…)

As noted by the trial court, the term "contemplate" denotes nothing more than a contingency or possibility. See Black's Law Dictionary (6 ed), p 318 (defining contemplate as "to have in mind as contingent or probable as an end or intention"). Thus, when the plain and ordinary meaning of the term is applied, the parties' use of the term "contemplate" lends an uncertainty to the manner in which plaintiffs would obtain permanent financing of its stores. Given this uncertainty, it cannot be reasonably concluded that the agreements were intended to limit plaintiffs' options with respect to acquiring permanent financing. Although the sentence at issue here indicates that the parties envisioned or anticipated that a public offering would be the vehicle used to obtain such financing, the sentence does not mandate that a public offering be used and cannot, therefore, be read as precluding plaintiffs from employing other methods of financing.

Support for this conclusion can be found in case law. As noted by plaintiff, in considering the import of the term "contemplate," as used in a contract for the construction and lease of a building, our Supreme Court in *Hansen v Catsman*, 371 Mich 79, 83; 123 NW2d 265 (1963) stated that, "[o]rdinarily, the word "contemplate" indicates an expectation or intention rather than a promise or undertaking." Applying the word's ordinary meaning, the Court held that the parties' agreement was "insufficient, as a matter of law," to impose upon the defendant an obligation to construct and lease the building. *Id*. at 84. The language at issue here is similarly insufficient to impose the restrictions argued by defendants. Accordingly, the trial court did not err in concluding that the financing agreements at issue did not limit plaintiffs' options for obtaining permanent financing to a public offering. Summary disposition in favor of plaintiffs was, therefore, properly granted.

We affirm.

/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra
/s/ Peter D. O'Connell

(…continued)

simply because plaintiffs had not yet obtained the subject financing and that, as a future event, the acquisition of such financing was something that the parties could only "contemplate" at the time the agreements were written. Defendants further assert that the conclusion that the parties actually intended that a public offering be the exclusive method of obtaining permanent financing is supported by the two later financing agreements, which clearly set forth a contrary intent using the same "contemplated" language. However, as found by the trial court, the agreements at issue here "were carefully crafted, thoroughly articulate, and unambiguous in their specificity." Thus, this Court's interpretation of the disputed language "begins and ends" with the words found in the agreement. *Universal Underwriters Ins Co v Kneeland*, 464 Mich 491, 496; 628 NW2d 491 (2001).