STATE OF MICHIGAN

COURT OF APPEALS

AMERICAN ACQUEST MONA SHORES I,

Plaintiff-Appellant,

v

RANDERS ENGINEERING, INC., and RANDERS GROUP PROPERTY CORP.,

Defendants-Appellees.

UNPUBLISHED
July 12, 2002

No. 229236
Muskegon Circuit Court
LC No. 99-039387-CH

Before: Wilder, P.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's opinion and order denying plaintiff's motion for summary disposition and granting defendants'motion for summary disposition pursuant to MCR 2.116(C)(10). We reverse and remand.

In April 1986, plaintiff entered into a lease agreement with defendant Randers Engineering Incorporated. The property leased under this agreement was an office building that was designed and built by Randers, then sold to plaintiff and leased back to Randers for an initial period of ten years. In 1990, a portion of the lease was amended, after which the lease was assigned to defendant Randers Group Property Corporation for the duration of the lease plus one year.[1]

Shortly before termination of the lease in late 1997, plaintiff discovered that soil shifts beneath the building had caused the timber foundation piles to deflect laterally, resulting in structural damage to both the interior and exterior of the building.[2] Plaintiff thereafter undertook measures to repair the building, at a cost of more than $115,000, and submitted a claim to its

[1] Although Randers Engineering remained "primarily liable for all agreements, obligations and responsibilities" under the amended lease, Randers Group assumed secondary liability for such agreements, obligations, and responsibilities. Because it is therefore unnecessary to distinguish between these parties with respect to the lease requirements and obligations, we refer to both parties collectively as "defendants."

[2] Defendants do not dispute that, although they discovered the lateral deflection of the piles in May 1991, they failed to inform plaintiff of the associated problems, choosing instead to make a series of repairs intended to stabilize the building and prevent further damage.

insurance company for the repairs. When coverage was denied, plaintiff demanded that defendants reimburse it for the cost of the repairs, claiming that, under the lease, defendants were responsible for all structural repairs to the building. Defendants refused to pay, arguing that the soil movement that caused the damage was the result of a flood that had occurred during record high rainfalls in the fall of 1986, which, defendants argued, constituted a "casualty" loss for which they were specifically exempted from responsibility under the lease.

On June 6, 1999, plaintiff filed the instant default action, seeking to recover the costs incurred in repairing the building. Shortly thereafter, plaintiff moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that under Sections 7 and 9 of the lease, which obligated defendants to insure the building against fire and "other risk perils" and to bear the cost of all structural repairs, defendants' liability for the repairs was clear. In response, defendants filed a cross-motion for summary disposition, asserting that the soil shifts that caused the damage complained of by plaintiff, whether precipitated by flood waters or not, was a "casualty" specifically exempted from defendants' responsibility under Sections 8 and 18 of the lease. Responding to plaintiff's claim that because defendants had known of the soil shift for a number of years and yet failed to notify plaintiff of the associated problems, defendants should be estopped from asserting casualty as a cause of the loss, defendants further argued that even if such an event did not constitute a casualty within the meaning of these sections, defendants had fulfilled their general obligation to repair under Section 9 of the lease, which did not contemplate the extraordinary repairs made by plaintiff.

In its written opinion and order denying plaintiff's motion for summary disposition and granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10), the trial court found that although the lease imposed responsibility for general maintenance and repair upon defendants, plaintiff was responsible "for more significant losses such as casualty." Further finding that the heavy rainfalls in 1986 constituted such a casualty, the trial court ruled that plaintiff was responsible for the cost of structural repairs stemming from the soil shifts. In reaching this conclusion, the trial court rejected plaintiff's claim that defendants were responsible for the cost of repairs in the absence of insurance coverage, citing the absence of "express and unequivocal" language requiring defendant to insure against such a loss, and noting that, in any event, it was plaintiff's responsibility to "cover any gaps" in the insurance coverage obtained by defendants. Finding also that plaintiff had failed to show that defendants had "misled" plaintiff, the trial court similarly rejected plaintiff's claim that, because defendants had failed to inform plaintiff of the soil shifts when they first discovered the associated problems, defendants should be estopped from asserting a casualty to escape liability for the associated repairs.

The trial court subsequently denied plaintiff's motion for reconsideration. This appeal followed.

On appeal, plaintiff first argues that because it presented sufficient evidence to raise a genuine issue of material fact concerning the cause of the building's structural failure, the trial court erred in granting summary disposition under MCR 2.116(C)(10). We agree.

This Court reviews de novo a trial court's decision to grant or deny summary disposition. *Hazle v Ford Motor Co*, 464 Mich 456, 461; 628 NW2d 515 (2001). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support of a claim. *Smith v Globe Life Ins*

Co, 460 Mich 446, 454; 597 NW2d 28 (1999). In deciding the motion, the trial court must examine all the documentary evidence in a light most favorable to the nonmoving party and determine as a matter of law whether there exists a genuine issue of material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). In doing so, however, the court may not weigh the evidence before it or make findings of fact. *Barnell v Taubman Co, Inc*, 203 Mich App 110, 115; 512 NW2d 13 (1993). If the evidence before it is conflicting, summary disposition is improper. *Id*.

The issue of liability in this case involved the cause of the building's structural failure, which the trial court concluded was the result of heavy rainfall and flooding during the years 1986 and 1987. With respect to such cause, however, plaintiff proffered the affidavit of Steven Elliot, a professional engineer who examined the building in November 1997. According to Elliot, the primary cause of the piling deflection that caused the building's structural failure, was a "slope stability failure" caused by the "relatively low shear strength" of the peat and sand fill on which the building rested. While Elliot acknowledged that "[p]eriodic variations in the ground water level may have contributed to the shear failure," he specifically concluded that such variations were not the primary cause of deflection, which he believed "occurred over a period of years, . . . was not the result of a single incident or event," and "would probably have occurred [even] in the absence of any variations in the ground water levels of the property." Although defendants offered affidavits attesting to the heavy rainfall and flooding, as well as their adverse effects on the fill beneath the building, Elliot's conflicting affidavit was sufficient to establish a genuine issue of material fact regarding the cause of the building's structural failure.

Thus, to the extent the trial court concluded, in the face of conflicting evidence, that the structural failings resulted from heavy rainfall and floodwaters, it erred. *Barnell, supra*. The trial court should have confined itself to deciding whether defendants' motion was properly supported, and, if so, whether plaintiff's response raised a genuine issue of material fact. Accordingly, summary disposition in favor of defendants was improperly granted.[3]

Plaintiff next argues that the trial court erred in determining that the lease specifically exempted defendants from responsibility for "casualty" losses, and that, therefore, plaintiff was responsible for the cost of the building's structural repairs. Again, we agree. The interpretation of contractual language is an issue of law that is reviewed de novo by this Court. *Singer v American States Ins*, 245 Mich App 370, 373-374; 631 NW2d 34 (2001). The relevant lease provisions here provide as follows:

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[3] In reaching this conclusion, we reject defendants' argument below that, regardless of the cause, "earth movement" is a casualty specifically exempted from defendants' responsibility under the lease. Even assuming that the trial court correctly ruled that defendants are not responsible for such losses, should it be determined that it was in fact the additional load of the fill sand (and not the heavy rainfall and floodwaters) that caused the pilings to deflect, defendants would be estopped from asserting such cause as a casualty. See *Michigan Mut Liability Ins Co v Fruehauf Corp*, 63 Mich App 109, 118; 234 NW2d 424 (1975) (damages that occur as a result of a defendant's negligent construction cannot be termed a casualty).

> 8.01 It is understood and agreed that if the Premises are damaged or destroyed in whole or in part by fire or other casualty during the continuation of this Lease, then if net insurance proceeds sufficient to completely repair and restore the Premises are paid on account of such damage or destruction, Landlord shall be obligated to repair and restore the Premises.
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> * * *
>
> 9.01 Tenant agrees at its own expense to keep the Improvements, including all structural, electrical, mechanical and plumbing systems at all times in good appearance and repair, and to restore the same after any damage or destruction. Tenant will also maintain the remainder of the Premises, at its own expense; provided, however, that Landlord will have the obligation set forth in Section 8 and Section 26.01 hereof.
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> * * *
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> 18.01 At the expiration (or early termination) of this Lease, Tenant will surrender the Premises broom clean and in as good condition and repair as they were on the date of this Lease, reasonable wear and tear and damage by fire or other casualty excepted, ...

The plain language of these provisions does not support the trial court's conclusion. See *Old Kent Bank v Sobczak*, 243 Mich App 57, 63; 620 NW2d 663 (2000) (the primary goal in interpreting contracts is to determine and enforce the parties' intent, as gleaned from the plain language of the contract itself).[4]

To begin with, Section 9 of the lease specifically states that "tenant agrees at its own expense to keep the improvements, including all structural . . . systems at all time in good appearance and repair and restore the same after any damage or destruction." The only pertinent[5] limitation to the broad obligation thus undertaken by defendants is the proviso that "landlord will have the obligation set forth in Section 8," specifically Section 8.01.

Further, as argued by plaintiff below, defendants were required, under Sections 7.01 and 7.03 of the lease, to insure the building for full replacement costs against "fire . . . and all other risk perils." Although plaintiff was allowed by Section 7.07 to step in and procure insurance coverage if defendants failed in this regard, the lease also expressly provides that doing so does not constitute a waiver of defendants' obligation to provide insurance.[6]

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[4] To the extent that defendants rely upon general principles of law applicable to standard leases, we reject arguments that are not consistent with the language of the lease at issue here. Further, we note that this was not the typical leasehold situation. Defendant, the tenants, built the building at issue, sold it to plaintiff and leased it back.

[5] Defendants do not argue that Section 26.01 of the lease has any applicability to this case.

[6] The trial court relied upon *Milbrand Co v Lumbermens Mutual Ins Co*, 175 Mich App 392; 438 NW2d 285 (1989). In finding that the tenants there were not liable to the landlord for the cost of
(continued…)

It is in light of the insurance obligation that defendants undertook that the proviso in Section 9 regarding landlord's (plaintiff's) obligations under Section 8.01 must be understood. Defendants' Section 9 obligation to repair any damage or destruction to the building would have been satisfied if defendants had purchased insurance coverage and plaintiff had received insurance proceeds sufficient to complete repairs. In that case, under Section 8.01 of the lease, the obligation to make repairs would have been plaintiff's. In the absence of insurance coverage, however, nothing in these Sections relieves defendants of their obligation under Section 9 to repair "any damage or destruction" to the building.

The trial court also relied on Section 18.01, which requires defendants, upon expiration (or earlier termination) of the lease, to surrender a clean and reasonably maintained building except for "reasonable wear and tear and damage caused by fire or other casualty." Nothing in this Section overrides Section 9's clear statement that defendants are responsible for repairs to the building. Instead, this provision merely facilitates an early termination of the lease and surrender of the building by defendants should casualty damages require an extensive period of repair. See Section 8.03. In that situation, it would be senseless to require defendants to make repairs prior to termination of the lease and surrender of the building. Still, defendants' Section 9 repair obligation would remain. This is further evidenced by language in Section 18.01 itself, which details how plaintiff, as landlord, may invoice costs and expenses incurred in repairing the building to defendants, as tenants, for reimbursement.

Finally, plaintiff argues that, in light of the fact that defendants had known of the soil shifts for a number of years and yet failed to notify plaintiff of the associated problems, the trial court erred in ruling that defendants were not estopped from asserting such casualty as a cause of plaintiff's loss. We disagree.

Estoppel is an equitable doctrine that operates to preclude a party from asserting or denying the existence of a particular fact. *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 140-141; 602 NW2d 390 (1999). However, "[s]ilence or inaction may form the basis for an equitable estoppel only where the silent party had a duty or obligation to speak or take action." *Id*. at 141. Here, nothing in the lease provisions obligated defendants to inform plaintiff of any problems associated with the building. Accordingly, we conclude that the trial court properly found the doctrine to be inapplicable under the facts of this case.

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structural repairs not covered by insurance, the *Milbrand* Court construed the lease to place the duty to "ensure that the building was adequately insured" on the landlord, while "[t]he duty on [the tenants] was merely to cover the cost of that insurance." *Id*. at 398.

However, it is unclear whether the lease in *Milbrand* contained language similar to that found in Section 7.07 of the instant lease, which provides that the landlord's procurement of insurance does not waive or release the tenant from any of the tenant's obligations.

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra