

STATE OF MICHIGAN
COURT OF APPEALS

VINCE POPOVSKI,

Plaintiff/Counter-Defendant-
Appellant,

v

NJ ENTERPRISES, LLC,

Defendant/Counter-Plaintiff-
Appellee.

UNPUBLISHED

November 28, 2006

No. 262309

Macomb Circuit Court

LC No. 2004-003863-AV

Before: Servitto, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Plaintiff appeals by leave granted the circuit court order reversing in part the district court's order in this landlord-tenant dispute involving commercial property. We affirm.

Plaintiff is an insurance agent and rented office space in a shopping center from defendant. The lease at issue involved the period from November 1, 1998, through October 31, 2001.¹ The lease provided a graduated rent payment schedule, with a fixed minimum annual rental of rate of \$920 per month for the first year, \$1020 per month for the second year, and \$1,120 for the third year. The lease also contained a penalty provision that required a holdover tenant to pay additional rent:

Section 21.1 Holding Over. Any holding over after the expiration of the term hereof, shall be construed to be a tenancy from month to month at the Minimum Rental of seven percent (7%) per day of the then current Minimum Rental provided for in Section 3.1 hereof together with all other rents and charges herein provided and shall otherwise be on the terms and conditions herein specified, so far as applicable. This provision shall not preclude Landlord from recovering any and all damages Landlord may incur as a result of Tenant's failure to timely deliver possession of the Premises to the Landlord.

¹ Plaintiff had leased the premises since 1995.

At the conclusion of the lease term plaintiff did not vacate the premises, but continued to pay monthly rent of \$1,120. Plaintiff vacated the premises at the end of April 2002. Plaintiff brought the present suit after defendant declined to return plaintiff's security deposit.² Defendant counterclaimed for additional rent during the time plaintiff was a holdover tenant, as well as for additional monies for cleaning and repairing the premises.³

After taking testimony at a bench trial, the district court ruled, "Holding-over, by the terms of this lease, involves holding over by a tenant in a hostile manner, where possession of the premises has been demanded by the landlord at the expiration of the – of the lease. And it's clear that did not occur in this case" The district court therefore denied defendant's counterclaim for additional rent. The district court awarded plaintiff his security deposit in the amount of \$1,800, subject to setoffs awarded to defendant. Defendant was awarded \$500 for cleanup and repair expenses, \$126 for lock replacement, and \$80 for sign adjustments. The district court also awarded plaintiff interest as of the filing of the complaint.

Defendant appealed to the circuit court, which reversed the district court's finding that plaintiff was not a holdover tenant. The circuit court determined that the district court "essentially injected an additional term into this provision [Section 21.1]" by finding that the language of § 21.1 involved holding over by a tenant in a hostile manner. The circuit court stated that

The provision plainly reads that if the tenant holds over, he will owe a certain amount. There is no requirement that the landlord first order tenant to vacate.

The circuit court determined, in relevant part, that defendant did not waive its right to additional rent under § 21.1 by accepting plaintiff's rent because the right to additional rent was specifically set forth in the lease and required no action on the part of defendant.⁴

This Court reviews the factual findings of a trial court sitting without a jury for clear error. MCR 2.613(C). Additionally, this Court reviews a trial court's conclusions of law de novo. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000).

Several well-established principles guide our interpretation of the parties' lease agreement. Where contractual language is clear, its construction is a question of law that we review de novo. *Pakideh v Franklin Commercial Mortgage Group, Inc*, 213 Mich App 636, 640; 540 NW2d 777 (1995). The cardinal rule in the interpretation of a contract is to ascertain the intent of the parties. The court must look for the intent of the parties in the words used in the instrument, and may not make a different contract for the parties or look to extrinsic evidence to

² The security deposit was \$1,800.

³ Defendant claimed plaintiff owed additional rent in the amount of \$14,190 and cleaning and repair monies in the amount of \$2,786.

⁴ The circuit court affirmed the district court's rulings with regard to the repairs and clean-up fee, but remanded the case with regard to the applicable interest rate and attorney fees.

determine their intent when the words comprising the contract are clear and unambiguous and have a definite meaning. *Zurich Insurance Co v CCR & Co (On Rehearing)*, 226 Mich App 599, 603-604; 576 NW2d 392 (1997).

The unambiguous language of § 21.1 provides that “any” holding over by the tenant shall be construed to be a tenancy from month to month at the minimum monthly rental of 7% per day of the then-current minimum rental indicated in the lease, along with all other rents and charges. A holdover was expressly created by the terms of the lease agreement. The first sentence of § 21.1 refers to “any” holdover tenant. A holdover tenant is defined as one “who retains possession after the expiration of a lease, or after tenancy at will has been terminated.” Black’s Law Dictionary (5th Ed., 1979), p 658. The definition does not include an element of hostility, nor does it include a requirement that the landlord first order the tenant to vacate. “Holding over” has a definite legal meaning, and it is presumed that the parties to the lease intended the term to bear that meaning unless a contrary intention is shown. See *Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Inst*, 266 Mich App 39, 58-59; 698 NW2d 900 (2005). No such contrary intention exists in this case. Hence, upon expiration of the lease period, plaintiff was a holdover tenant subject to additional rent under the terms of § 21.1

Plaintiff also argues that defendant either waived the right to collect additional rent or is estopped from collecting additional rent under § 21.1 because defendant accepted monthly rent checks in the amount of \$1,120 for six months after the termination of the lease. This Court reviews equitable claims under a de novo standard. *Webb v Smith (After Second Remand)*, 224 Mich App 203, 210; 568 NW2d 378 (1997).

Plaintiff provides no authority directly on point in support of the assertion that defendant was prohibited from collecting holdover rent because it accepted the original rental amount after the lease expired.⁵ Our research reveals no binding Michigan authority holding that a landlord is prohibited from collecting additional rent under the express terms of a holdover provision in a lease by accepting rent payments for less than the full amount due. Nonetheless, the holdover tenant provision is clearly set forth in the lease and plainly states that “any holding over after the expiration of the term hereof shall be construed to be a tenancy from month to month at the Minimum Rental of seven percent (7%) per day of the then-current rental provided for in Section 3.1 hereof . . .” The provision does not require the landlord to provide additional notice of the increased rental amount.

Additionally, § 25.5 of the lease provides:

No payment by Tenant or receipt by Landlord of a lesser amount than the monthly rent herein shall be deemed to be other than on account of the earliest stipulated rent, nor shall any endorsement or statement on any check or any letter accompanying any check or payment as rent be deemed an accord and satisfaction and Landlord shall accept such check or payment without prejudice to Landlord’s

⁵ The cases cited by plaintiff are inapposite, as they concern the waiver of a landlord's right to terminate a lease or to serve a notice to quit.

right to recover the balance of such rent or pursue any other remedy in this Lease provided.

Considering the plain language of § 21.1 as well as § 25.5, we conclude that plaintiff remained obligated to pay the additional rental amount as a holdover tenant notwithstanding defendant's acceptance of rental payments for less than the full amount due.

Affirmed.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot