STATE OF MICHIGAN

COURT OF APPEALS

RAINBOW USA, INC, Plaintiff/Counter-Defendant-Appellee,	UNPUBLISHED January 5, 2010
v	No. 288640 Wayne Circuit Court
SEVEN GRAND ASSOCIATES, L.L.C., Defendant/Counter-Plaintiff-Appellant.	LC No. 07-706968-CZ

Before: Gleicher, P.J., and Fitzgerald and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right from an order granting summary disposition to plaintiff in this declaratory action, in which the trial court construed the disputed provision of a commercial lease in plaintiff's favor. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant is the landlord of a shopping center in which plaintiff leases space for a retail store. Article II of the lease governed "rent." Section 2.01 provided that "minimum rent" was $84,501 per year. Section 2.02 provided that, in addition to the minimum rent, plaintiff would pay percentage rent of four percent of all gross sales. Section 2.04 provided that plaintiff would pay a proportionate share of taxes and assessments. Section 2.05, entitled "additional payments," provided that rent was defined in the lease "as minimum rent, percentage rent, ~~cost of living~~, and all other sums of money or charges required to be paid by Tenant under this Lease or in the Exhibits attached hereto. . . ."[1] A separate section of the lease, Article VIII, entitled "operation, use and maintenance of common areas," provided that plaintiff was to pay a pro rata share for such expenses, including "the cost of insuring all property provided by Landlord which may at any time comprise the Shopping Center."

[1] Throughout this opinion, the language we quote from the lease reflects additions and deletions made by the parties during negotiations. For example, in § 2.05, the definition of rent originally included the term "cost of living," but this term was crossed out before the parties signed the lease.

In an addendum, the lease included an anchor tenancy clause at § 27.19. It provided:

> In the event that Big Lots, [Oak Foods,] or more than 15% of the ~~present co-tenants~~ [remaining gross leasable area of the Shopping Center] ever go dark ~~for more than 90 days~~, **Tenant shall have the option to convert [its] total rental obligation to [4%] of gross sales in lieu of ~~minimum~~ [all] rent**. ~~If Tenant was to exercise this option, then Landlord shall have the right to terminate the lease with 30 days written notice.~~ Further, Tenant shall have the [additional] right to terminate the lease [at any time] if any of the above conditions persist for more than ~~three~~ [two (2)] months by providing 30 days notice. [Emphasis added.]

In December 2005, Big Lots went out of business. Plaintiff exercised its option under the anchor tenancy clause in § 27.19 to convert its rental obligation to four percent of gross sales. In November 2006, Nationwide Furniture moved into the Big Lots space. Nationwide Furniture subsequently went out of business. Defendant asserted that plaintiff's rent reverted back to the original amount paid during the period that Nationwide Furniture occupied the Big Lots space. Defendant also asserted that the term "all rent," as used in § 27.19, includes taxes, insurance and common areas costs. Plaintiff asserted that it could convert its payments upon the triggering of the anchor tenancy clause and that the rent did not convert back to the original amount when Nationwide Furniture occupied the Big Lots space. The trial court agreed with plaintiff, finding that the rent did not convert back to the original terms and that "all rent" included common area expenses (implicitly including insurance), taxes, and rent. Accordingly, the trial court granted summary disposition in favor of plaintiff, and this appeal ensued.

Review of a trial court's grant of summary disposition is de novo. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003). "The interpretation of a contract is also a question of law this Court reviews de novo on appeal, including whether the language of a contract is ambiguous and requires resolution by the trier of fact." *DaimlerChrysler Corp v G Tech Professional Staffing, Inc*, 260 Mich App 183, 184-185; 678 NW2d 647 (2003).

A contract must be interpreted according to its plain and ordinary meaning. *Holmes v Holmes*, 281 Mich App 575, 593; 760 NW2d 300 (2008).

> Under ordinary contract principles if contractual language is clear, construction of the contract is a question of law for the court. If the contract is subject to two reasonable interpretations [or the provisions irreconcilably conflict with each other], factual development is necessary to determine the intent of the parties and summary disposition is therefore inappropriate. If the contract, although inartfully worded or clumsily arranged, fairly admits of but one interpretation, it is not ambiguous. *Meagher v Wayne State Univ*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997); see also *Shaw v City of Ecorse*, 283 Mich App 1, 22; 770 NW2d 31 (2009).

A court may not rewrite clear and unambiguous language under the guise of interpretation. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 354; 596 NW2d 190 (1999). Rather, courts must give "effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory." *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003).

Defendant first argues that the trial court erred in construing the term "convert" in § 27.19 to allow the tenant to *permanently* convert its total rental obligation. Defendant maintains that the term "convert" is ambiguous because it could either mean that by electing the option, the total rental obligation: 1) would permanently change to four percent of gross sales, or 2) would vary between four percent of gross sales and the original rental obligation depending on occupancy. Thus, defendant argues that further factual development is necessary to determine the intent of the parties. We disagree.

We conclude that the term "convert" in the anchor tenancy clause is capable of only one interpretation and is unambiguous. *Meagher*, 222 Mich App at 721. '"When considering a word or phrase that has not been given prior legal meaning, resort to a lay dictionary such as Webster's is appropriate.'" *Citizens Ins Co v Pro-Seal Service Group, Inc*, 477 Mich 75, 84; 730 NW2d 682 (2007), quoting *Greene v AP Products, Ltd*, 475 Mich 502, 510; 717 NW2d 855 (2006). The *Random House Webster's College Dictionary* (2001) defines "convert" as "to change into something of different form or properties; transmute; transform." Applying this definition to § 27.19, upon the occurrence of the condition, such as Big Lots' closure, plaintiff had the option to convert or change its original rental obligation to something of a different form, namely four percent of gross sales. Contrary to defendant's interpretation, the plain language of the lease does not provide for a subsequent conversion of the rental obligation, from four percent of gross sales back to the original rental obligation, upon the occurrence of another condition, such as occupancy in Big Lots' leasable space. Defendant's interpretation would amount to a modification of clear and unambiguous language. Such a modification is not permitted by contract law. *Henderson*, 460 Mich at 354.

Defendant next argues that the trial court erred in construing § 27.19 to relieve plaintiff of its obligation to pay overhead costs. Defendant asserts that the election to convert the "total rental obligation to [4%] . . . of gross sales in lieu of all rent" should be interpreted to mean that plaintiff is obligated to pay four percent of gross sales *plus* pro rata common area expenses, insurance and taxes. Plaintiff counters that "all rent" should be interpreted to mean "minimum rent, percentage rent, . . . and all other sums of money or charges required to be paid by tenant under this Lease" according to the definition of "rent" in § 2.05.

We conclude that the phrase "all rent" in § 27.19 is also capable of only one interpretation and is unambiguous. *Meagher*, 222 Mich App at 721. Section 2.05 clearly states that "rent" is defined throughout the lease as "minimum rent, percentage rent, . . . and all other sums of money or charges required to be paid by tenant under this Lease." As we stated, *supra*, under the lease plaintiff was obligated to pay pro rata charges for the common area expenses, insurance and taxes. Thus, these charges clearly fell within plaintiff's rental obligation until plaintiff elected to convert that "total rental obligation" to four percent of gross sales and was relieved of the charges.

We reject defendant's argument that the definition of rent in § 2.05 is only applicable to tenant default because, in § 2.05, the parties stated, "Rent shall be defined in this Lease" and did not limit the definition to that section only.

Defendant also argues that the application of this definition of rent to other sections of the lease would result in surplusage. For example, in § 2.04:

> If the total amount [of pro rata taxes] paid by Tenant hereunder for any such calendar year shall exceed such actual amount due from Tenant for such calendar year, such excess shall be credited against the next installment of **rent and additional rent** due from Tenant to Landlord hereunder. [Emphasis added.][2]

The parties may not have intended the definition of "rent" to apply in these sections where other, more specific charges are referenced. The parties' references to "rent" may have been added clumsily or redundantly. *Meagher*, 222 Mich App at 721-722; see *Mich Twp Participating Plan v Pavolich*, 232 Mich App 378, 389; 591 NW2d 325 (1998) ("a finding of surplusage does not equate to a finding of ambiguity"). Nevertheless, in § 27.19, the parties clearly intended the full definition of rent to apply because they modified the term "rent" with the term "all."[3] Had the parties intended a different definition of rent to apply, they would have modified the term "rent" with a qualifying term like "minimum," "percentage," or "additional." Again, this Court will not rewrite clear and unambiguous language to modify "rent" with such a qualifying term. *Henderson*, 460 Mich at 354. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ E. Thomas Fitzgerald
/s/ Kurtis T. Wilder

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[2] Section 1.03 of the lease and § 2 of the Rider speak to "rent and additional rent"; § 5.01 of the lease speaks to "rent, additional rent, taxes, assessments, impositions and all other charges, including utilities"; § 10.01 speaks to "rent and other charges"; § 19.01 speaks to "any rental or other charges"; and § 19.02 speaks to "rent and other charges"; § 26.04 speaks to "rent, percentage rent or any other payments required by the terms of this Lease."

[3] The *Random House Webster's College Dictionary* (1991) defines "all" as "the whole or full amount of."