

STATE OF MICHIGAN
COURT OF APPEALS

KENT W. BURKHART,

Plaintiff/Counter-defendant-
Appellant,

v

JEREMY LAPHAM,

Defendant/Counter-plaintiff-
Appellee,

and

ANNA CHEN and TIMOTHY KLEMPAY,

Defendants-Appellees.

UNPUBLISHED
December 2, 2010

No. 291705
Washtenaw Circuit Court
LC No. 08-000810-AV

Before: BORRELLO, P.J., and JANSEN and BANDSTRA, JJ.

PER CURIAM.

Plaintiff appeals by leave granted the decision of the circuit court affirming the district court's dismissal of his claim. We reverse and remand for further proceedings consistent with this opinion.

Plaintiff sued defendants, who were tenants of rental property owned by plaintiff's father in Ann Arbor, for damages to the unit and back rent. Plaintiff's father, Ben Burkhart, signed a two-year lease on August 4, 2003, to commence on September 1, 2003, with defendants Chen and Lapham. This lease expired on September 1, 2005; thereafter the tenancy converted to a month-to month tenancy. Defendant Chen represented to the district court that she left the residence sometime after the summer of 2005 and before the spring of 2006, while defendant Lapham apparently vacated the residence on or about September 7, 2007. Defendant Klempay was not a party to the lease agreement, but he told the district court that he had a month-to-month verbal tenancy agreement with plaintiff's father, pursuant to which he lived in the apartment from August 2006 to August 2007.

Defendants argued that plaintiff lacked the legal capacity to sue them under their respective leases because he was not a party to them. Plaintiff presented the district court with a

document entitled “Assignment of Rents and Leases” (hereafter, “the Assignment”), signed by plaintiff and his father, that plaintiff argued gave him the right to sue defendants. The Assignment, executed on September 27, 2007, provides in relevant part:

Ben J. Burkhart, for valuable consideration the receipt [of] which is hereby acknowledged, hereby conveys, transfers and assigns to his son, Kent W. Burkhart, his successors and assigns, all the rights, interest and privileges he has and may have in the leases now existing or hereafter made affecting the real property located in Ann Arbor, Michigan commonly referred to as 336 East Washington, 1st Floor apartment, as said leases may have been, or may from time to time be hereafter modified, extended and renewed, with all rents, income and profits due therefrom. This includes, but is not limited to a lease dated August 4, 2003 starting September, 2003 with Anna L. Chen & Jeremy Lapham.

Defendants argued that their leases terminated before the Assignment was executed, and therefore that it did not convey any rights in those leases to plaintiff.

While the Assignment was not formally admitted into evidence during the bench trial, the district court acknowledged receiving the document during a pretrial hearing, it was referenced and read from during the trial and the district court based its decision to dismiss on the language of the Assignment. The district court concluded that the document did not grant plaintiff the right to sue defendants because it assigned only rights under leases in existence at the time of the Assignment or executed thereafter. On appeal, the circuit court decided the case on alternate grounds, holding that the Assignment was not a part of the trial court record and thus, that plaintiff had presented no evidence that he had legal standing to sue defendants.

Plaintiff first argues that the circuit court erred by concluding that the Assignment was not part of the record on appeal of the district court’s decision. We agree.

Our review of the trial transcript reveals that at the time the district court judge allowed defendants to interrupt plaintiff’s presentation of his proofs for the purpose of making motions to dismiss, plaintiff had formally introduced into evidence four pieces of documentary evidence: a lease, and three photographs. The transcript indicates that, at that point in the proceedings, the Assignment had not been formally marked as an exhibit, plaintiff’s counsel had not moved to admit the Assignment into evidence, and the district court had not specifically admitted the Assignment into evidence. However, the Assignment was provided to the district court judge, counsel read from the document in arguing defendants’ motions to dismiss, and the district judge relied on it in ruling on those motions. Therefore, for all intents and purposes, the Assignment was considered as admitted evidence by the district court. Thus, especially considering that plaintiff had not yet closed his proofs or rested his case, the circuit court erred by concluding that

plaintiff failed to offer any evidence demonstrating his legal standing to pursue the instant claims against defendants.¹

Plaintiff argues further that the Assignment conferred on him legal standing to assert the instant claims against defendants. For the reasons set forth below, considering the record presented before us, we remand this matter to the district court for a determination as to the date on which any month-to-month lease under which defendants resided in the apartment terminated.

Contractual rights can be assigned, unless the assignment is clearly restricted. *Burkhardt v Bailey*, 260 Mich App 636, 652; 680 NW2d 453 (2004). “An assignee stands in the position of the assignor, possessing the same rights and being subject to the same defenses.” *Id.* at 652-653; see also *Prof Rehab Assoc v State Farm Mut Auto Ins Co*, 228 Mich App 167, 177; 577 NW2d 909 (1998). “[A] written instrument, even if poorly drafted, creates an assignment if it clearly reflects the intent of the assignor to presently transfer ‘the thing’ to the assignee.” *Id.* at 654.

An assignment is a contract between the assignor and the assignee and is interpreted according to the rules of contract construction, 7 Am Jur 2d, Assignment, § 1, p 146, which include as follows:

The main goal of contract interpretation generally is to enforce the parties’ intent. *Mahnick v Bell Co*, 256 Mich App 154, 158-159; 662 NW2d 830 (2003). But when the language of a document is clear and unambiguous, interpretation is limited to the actual words used, *Universal Underwriters Inc Co v Kneeland*, 464 Mich 491, 496; 628 NW2d 491 (2001), and parol evidence is inadmissible to prove a different intent, *Meagher v Wayne State Univ*, 222 Mich App 700, 722; 565 NW2d 401 (1997). An unambiguous contract must be enforced according to its terms. *Mahnick*, [256 Mich App] at 159. The judiciary may not rewrite

¹ Further, defendants’ motions presented in the posture of motions for summary disposition, pursuant to MCR 2.116(C)(5), on the basis that plaintiff lacked the legal capacity to sue. Therefore, the district judge was required to consider “affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties” MCR 2.116(G)(5). This includes “documentary evidence that would be ‘plausibly admissible’ at trial if a proper foundation is laid is sufficient” *1300 Lafayette East Coop, Inc v Savoy*, 284 Mich App 522, 526; 773 NW2d 57 (2009). The Assignment was part of the pleadings of record, having been attached to plaintiff’s answer to the affirmative defenses, the district court was provided with a copy of it at trial, defense counsel read from the Assignment in support of the motions to dismiss, and the district court considered the language of the Assignment when ruling on those motions. Under these circumstances, the Assignment was part of the record, for purposes of MCR 7.210(A)(1), was offered within the meaning of MCR 2.116(G)(5) for consideration in opposition to the motions for summary disposition, and was properly considered by the district court judge when evaluating the merits of the motions for summary disposition.

contracts on the basis of discerned “reasonable expectations” of the parties because to do so “is contrary to the bedrock principle of American contract law that parties are free to contract as they see fit, and the courts are to enforce the agreement as written absent some highly unusual circumstances, such as a contract in violation of law or public policy.” [*Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51; 664 NW2d 776 (2003).] [*Burkhardt*, 260 Mich App at 656-657.]

Although somewhat inartfully drafted, the plain language of the Assignment assigns to plaintiff “all the rights, interest and privileges” plaintiff’s father has or had (1) “in the leases now existing . . . affecting . . . 336 East Washington, 1st Floor apartment;” and (2) “in the leases . . . hereafter made affecting . . . 336 East Washington, 1st Floor apartment;” (3) which “[i]ncludes, but is not limited to a lease dated August 4, 2003 starting September, 2003 with Anna L. Chen & Jeremy Lapham.” Thus, plainly, the lease assigned all of Ben Burkhardt’s “rights, interest and privileges” in any lease existing on or made after September 27, 2007, including the 2003 Chen/Lapham lease.² The only question then, is whether the 2003 Chen/Lapham lease and the succeeding month-to-month tenancy arising from and governed by that lease, and/or the verbal Klempay lease were “in existence” on September 27, 2007, despite the fact that all defendants had surrendered possession of the apartment by that date.

The record indicates that the Chen/Lapham lease converted to a month-to-month tenancy on or about September 1, 2005. Thus, continued tenancy as of the first day of each calendar month thereafter would extend the lease until the end of that calendar month. Therefore, unless possession of the apartment was surrendered before September 1, 2007, the succeeding month-to-month lease remained “in existence” as of the execution of the Assignment on September 27, 2007. Plaintiff asserts in his brief to this Court that the tenants vacated the property on or about September 7, 2007; he testified at trial that he received the keys on that date. However, considering the manner in which the trial concluded, with the district court dismissing plaintiff’s claims and without any presentation of evidence by defendants, and considering that the district court did not make any finding of fact as to the date upon which possession was surrendered,³ we

² Amongst the rights, interest and privileges generally extended to a lessor under the terms of a lease are the right to collect rents, 49 Am Jur 2d, Landlord & Tenant, §§ 642-643, pp 627-629, and the right to recover for repairs where a lessee breached a covenant within the lease to keep the premises in repair, 49 Am Jur 2d, Landlord & Tenant, § 713, pp 685-686. Thus, the use of the phrase “all the rights, interest and privileges” is sufficiently broad to support a conclusion that plaintiff’s father assigned to plaintiff the rights to collect rent and to recover for repairs to the leasehold resulting from any breach of a covenant within the lease to keep the premises in repair, as pertains to any lease in existence at the time the assignment was executed, and any future leases, including the 2003 Chen/Lapham lease.

³ The district court concluded that, the written lease having expired in 2005, the Chen/Lapham lease was not “in existence” as of the date of the execution of the Assignment. The district court

cannot determine the date upon which any month-to-month lease between Ben Burkhart and Lapham and/or Chen finally concluded. Similarly, Klempay indicated that he resided in the apartment pursuant to a verbal month-to-month lease with Ben Burkhart. However, the record before us does not indicate when that lease began. Thus, even were we to accept that Klempay vacated the apartment on September 7, 2007, we are unable to determine, from the record presented, the date upon which the Klempay month-to-month lease terminated.

We reverse the lower court orders dismissing plaintiff's claims and remand this case to the district court for a determination as to the date upon which each of the month-to-month tenancies under which defendants occupied the apartment concluded. We note that a month-to-month tenancy extends to the end of any month-long period during which tenancy continued, regardless whether possession is relinquished during the month. Thus, by way of example, if it is determined that defendant Lapham vacated the apartment on or about September 7, 2007, a new "month" of tenancy having seemingly commenced on September 1, 2007, the month-to-month lease under which defendant Lapham resided in the apartment would have remained in existence at the time of the execution of, and would be subject to, the Assignment. Likewise, if it is determined that Klempay vacated the apartment on or about September 7, 2007, then unless Klempay's "month" of tenancy that included September 7, 2007 commenced before August 27, 2007, his month-to-month lease remained in existence at the time of the execution of, and would be subject to, the Assignment.⁴ Finally, while the record indicates that Chen may have vacated the apartment sometime before the spring of 2006, thus seemingly ending any month-to-month lease she may have had with Ben Burkhart well before execution of the Assignment, the date on which her month-to-month tenancy ended must also be definitively determined on remand.⁵

Finally, plaintiff claims that the district court abused its discretion by denying his request for adjournment on July 2, 2008. Plaintiff claims that he was forced to go to trial having "less than a day" to engage counsel, because his "intended counsel" had a scheduling conflict. Assuming that plaintiff's trial counsel was retained at the last minute, there is nothing in the record indicating that the delay was anyone's responsibility other than plaintiff's. Additionally, the record reflects that plaintiff's counsel had familiarized himself sufficiently with the case to conduct a detailed direct examination of plaintiff. The one area where counsel seemed possibly unprepared was with respect to the Assignment, and it would have been incumbent on plaintiff to make sure his counsel was made aware and provided a copy of this central document. Accordingly, any prejudice that did exist is reasonably attributable to plaintiff.

did not determine when any succeeding month-to-month tenancy by Lapham and/or Chen terminated.

⁴ The record indicates that Klempay moved into the apartment subject to a verbal month-to-month lease with Ben Burkhart in August 2006; the record is silent as to the day of the month on which the month-to-month lease began.

⁵ Both Klempay and Chen indicated the time frame in which they vacated the apartment to the district court during pretrial hearings. However, there was no evidence admitted at trial, other than plaintiff's testimony as to the date upon which he received the tenant's keys to the apartment, indicating the date upon which these defendants vacated the apartment.

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Stephen L. Borrello

/s/ Kathleen Jansen

/s/ Richard A. Bandstra