STATE OF MICHIGAN

COURT OF APPEALS

BATTLE CREEK REAL ESTATE DEVELOPMENT, LLC, TVC BATTLE CREEK CO., LLC, and PJD/BC, d/b/a BECKER-DIETZ ASSOCIATES, Plaintiffs-Appellees,	UNPUBLISHED October 19, 2017
v	No. 334933 Calhoun Circuit Court
RITE AID OF MICHIGAN, INC., and PDS-1 MICHIGAN, INC., Defendants-Appellants, and	LC No. 2015-003449-CK
PERRY DRUG STORES, INC., Defendant.	

Before: BOONSTRA, P.J., and METER and GADOLA, JJ.

PER CURIAM.

Defendants appeal as of right an order granting summary disposition to Plaintiffs under MCR 2.116(C)(10). We affirm.

This case involves various parcels of land in Battle Creek. One of the parcels, hereinafter referred to as "parcel A," contains a strip-mall building referred to as the Battle Creek Plaza; the parties agree that the building is owned by plaintiff Becker-Dietz Associates (BDA).[1] Defendant Rite Aid of Michigan, Inc. (Rite Aid), operates a drugstore in the building.[2] Adjacent to parcel A are additional parcels, currently owned by plaintiff Battle Creek Real Estate Development, LLC

[1] The parties do not agree regarding the correct owner of the parcel itself.

[2] Rite Aid's lease was originally entered into by Perry Drug Stores, Inc., but Rite Aid is the successor.

(BCRED), that will be referred to collectively in this opinion as "the Thompson parcel."[3] Plaintiff TVC Battle Creek Co., LLC, wishes to purchase the Thompson parcel from BCRED in order to construct a CVS drugstore on the property.

On November 25, 2015, plaintiffs filed a complaint for declaratory relief, seeking "a declaration of rights that certain parcels of real property located in Battle Creek, Michigan, which Plaintiffs have an interest in, are not subject to certain restrictions . . . preventing Plaintiffs from constructing a full-service pharmacy thereon." Plaintiffs argued that the lease between Rite Aid[4] and BDA "contains certain restrictions preventing the operation and maintenance of an additional pharmacy in the shopping center . . . in which Defendants are located; however, the plain and unambiguous language within the lease expressly limits the scope of those restrictions to only the shopping center." Plaintiffs alleged that the "shopping center parcel"—parcel A—on which the Rite Aid drugstore is situated is "directly adjacent and contiguous to the eastern portion of" the Thompson parcel but is "separate, having its own parcel identification numbers." Plaintiffs stated that the lease (and thus the restrictions regarding pharmacies) between Rite Aid and BDA applies only to the "retail development commonly known as Battle Creek Plaza," which is contained within the separate confines of parcel A.

Plaintiffs sought a declaration that the lease does not prohibit a drugstore from being operated on the Thompson parcel. Plaintiffs also sought a declaration that an applicable reciprocal easement agreement (REA) was intended merely to allow access to parcel A from the Thompson parcel and vice-versa.

On May 6, 2016, plaintiffs filed two motions for summary disposition under MCR 2.116(C)(10). In the first motion,[5] plaintiffs argued, and supplied evidence, that the lease between BDA and Rite Aid indicates that Rite Aid is renting space in a specifically-defined area. Plaintiffs pointed out the specific language from article 12 of the lease: "Landlord shall not permit in the Shopping Center, or any additions or extensions thereof, the operation . . . of a drugstore . . . ." Plaintiffs then provided an affidavit from Paul Dietz, trustee of the sole member of defendant PJD/BC, who stated, "Since 1995, there have been no additions or extensions to the Shopping Center." Plaintiffs also provided evidence that the Thompson parcel was not included in the legal description of the "Shopping Center" as identified in the lease.

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[3] This name derives from a prior owner, Donald F. Thompson.

[4] For ease of reference, we will use the singular "Rite Aid" to refer to Rite Aid and PDS-1 Michigan, Inc.

[5] In their second motion, labeled a "supplemental motion," plaintiffs stated that Rite Aid "failed to properly renew the lease agreement," which was set to expire on June 30, 2016. Plaintiffs stated that Perry Drug Stores, Inc., attempted to renew the lease but that the only party able to renew it was Rite Aid. The trial court eventually rejected this argument, and it is not at issue in the present appeal.

Plaintiffs additionally argued that even if the lease were to be deemed ambiguous, under case law it should be construed to allow free use of property. Plaintiffs lastly argued that the REA contained no restrictions regarding how the various properties were to be used but merely spoke to ingress and egress.

On May 27, 2016, Rite Aid filed a response to the motions for summary disposition and requested summary disposition in its favor in accordance with MCR 2.116(I)(2). Rite Aid stated that the lease describes the "Shopping Center" as a specific piece of land and pointed out that the leased premises include the Shopping Center "together with all *easements*, rights and appurtenances in connection therewith or thereunto belonging." (Emphasis added.) Rite Aid argued that the restriction regarding drugstores thus extended to the Thompson parcel because it was subject to an easement. Rite Aid also pointed to a portion of the lease stating that the landlord would provide "parking areas and other common areas of the Shopping Center," with "common areas" defined as "parking areas, roadways, . . . and all other areas or improvements which may be provided by the Landlord for the convenience and use of the tenants of the Shopping Center . . . ." Rite Aid stated that this language, coupled with the fact that there is an easement across the Thompson parcel, indicates that "the parties express[ed] a clear intent to include in the definition of 'Shopping Center' such portions of the common areas which are not located within the legal description . . . ." Rite Aid argued that the planned development for the Thompson parcel would be a "common area" and therefore is, according to the lease, subject to approval by Rite Aid.

Rite Aid also pointed to the language of the restriction itself, whereby the operation of a drugstore is prohibited "in the Shopping Center, or any additions or extensions thereof . . . ." It argued that this language affirms that the restriction extends beyond the parameters of the strip-mall building.

Rite Aid lastly argued that even if one were to disagree with its interpretation of the lease, case law from other jurisdictions indicates that grants of exclusive mercantile rights should extend even to adjacent properties later acquired by the landlord.

The motion hearing took place on June 6, 2016. Plaintiffs' attorney stated that the lease was fairly simple and unambiguous and showed that the Thompson parcel was not a "common area" and further showed that the drugstore restriction did not apply to the Thompson parcel. Rite Aid's attorney stated that the restriction extended to the Thompson parcel because of the easement, essentially arguing that the Thompson parcel became an "addition or extension" of the Shopping Center by way of the easement.

The trial court ruled in plaintiffs' favor, stating that the respective properties had never been merged and also stating:

> [Rite Aid] argues that an ambiguity exists and the shopping center in some way includes all easement rights and a pertinence [sic] in connection thereof or thereunder belonging. The Thompsons as owner [sic] of the adjoining property and the plaza owners entered into a reciprocal easement solely for ingress and egress purposes. [Rite Aid] now wants the [c]ourt to determine that [the Thompson parcel] is an extension or addition to the shopping center. There are

> clearly legal differences between fee simple ownership and the maintenance of the easement. . . . In none of the Thompson parcel documents do any of the restrictions contain an [sic] article 12 of the lease appear either directly or indirectly.

The court stated, "based upon the reasons cited in [p]laintiffs' brief . . . the [c]ourt does not believe that there is an ambiguity which would result in an extension of the lease provisions to the Thompson [parcel]."

Rite Aid filed a motion for reconsideration on July 21, 2016, in which it cited 1979 REA provisions applicable to the prior acquisition of part of the Thompson parcel by Donald F. Thompson. Rite Aid stated that the provisions were "in perpetuity" and prevented any owner of the property from building outside of a particular designated area and erecting a building of more than a certain size. The court stated that it had already ruled on this issue when it mentioned the various real-estate documents in its ruling from the bench, but it nonetheless clarified that Rite Aid's argument was countermanded by an amendment to the REA stating that the respective parties could erect buildings on their properties and that such an action would "fully and forever release the property so constructed upon from any claim or easement herein created."

After Rite Aid appealed in this Court, plaintiffs sought a bond with surety as security because of the delay in the construction schedule. The trial court denied their request.

We review de novo a trial court's ruling regarding a motion for summary disposition. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). A defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual sufficiency of a plaintiff's complaint. *Joseph*, 491 Mich at 206. Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ. See *Smith v Globe Life Ins Co*, 460 Mich 446, 455 n 2; 597 NW2d 28 (1999), superseded in part on other grounds by statute as stated in *Dell v Citizens Ins Co of America*, 312 Mich App 734, 742; 880 NW2d 280 (2015). The moving party "must specify the issues for which it claims there is no genuine factual dispute. Provided the moving party's motion is properly supported, . . . the opposing party must then respond with affidavits or other evidentiary materials that show the existence of a genuine issue for trial." *Skinner v Square D Co*, 445 Mich 153, 160; 516 NW2d 475 (1994), overruled in part on other grounds by *Smith*, 460 Mich at 455 n 2. The court reviewing the motion

> must consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. If the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Joseph*, 491 Mich at 206 (citations omitted).]

In addition, to the extent this case involves the interpretation of a contract, we note that clear contractual language must be applied as written. *City of Grosse Pointe Park v Michigan Municipal Liability & Prop Pool*, 473 Mich 188, 198; 702 NW2d 106 (2005).

Rite Aid argues that part of the Thompson parcel, hereinafter referred to as "parcel B," is included within the definition of "Shopping Center" in the lease because of the following language from the lease:

> Landlord . . . does hereby . . . lease . . . certain premises in the retail development commonly known as Battle Creek Plaza (hereinafter referred to as the "Shopping Center"), which retail development is shown on the site plan marked Exhibit "A" . . . . The Shopping Center . . . is more particularly described in Exhibit "B" . . . .

Exhibit B contains a legal description of parcel A and immediately after this states, "Together with and subject to a Reciprocal Easement Agreement . . . ." Rite Aid states that because the Shopping Center is "described" in exhibit B, and exhibit B mentions the easement across parcel B, parcel B necessarily is part of the Shopping Center, making parcel B subject to the restriction in the lease, which, again, is worded as follows: "Landlord shall not permit in the Shopping Center, or any additions or extensions thereof, the operation . . . of a drugstore . . . ."

Rite Aid's argument is without merit. The lease indicates that the Shopping Center is shown on the site plan in exhibit A. Significantly, exhibit A shows the parameters of parcel A and *explicitly states* that parcel B "*does not belong to shopping center*." (Emphasis added.) Exhibit B then sets forth the metes and bounds of parcel A and mentions that it is subject to an REA. An easement involves a right to use the land of another for a particular purpose. See, e.g., *McClintic-Marshall Co v Ford Motor Co*, 254 Mich 305, 317; 236 NW 792 (1931). The easement holder has qualified possession only. *Id*. When the contract, including exhibit A and exhibit B, is viewed as a whole, see *Haring Charter Twp v Cadillac*, 290 Mich App 728, 739; 811 NW2d 74 (2010), it becomes clear that, contrary to Rite Aid's argument, the easement did not make parcel B "part" of the Shopping Center. Nor did it make parcel B an "addition[] or extension[]" of the Shopping Center; it was simply an easement over land that was not part of the Shopping Center.[6] The easement specifically sets forth "a reciprocal easement for ingress and egress . . . ."[7] Rite Aid's appellate argument runs contrary to the unambiguous language of the lease. *City of Grosse Pointe Park*, 473 Mich at 198. The lease is not reasonably susceptible to more than one meaning. *Island Lake Arbors Condo Ass'n v Mesiner & Associates, PC*, 301 Mich App 384, 392; 837 NW2d 439 (2013).[8]

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[6] We do not disagree with Rite Aid's insistence that an easement constitutes an interest in real estate, but this does not change our conclusion about the clear meaning of the contract.

[7] As noted by plaintiffs on appeal, Rite Aid signed the lease in 1995, when Thompson still owned parcel B. If he had not sold parcel B to BCRED, Thompson could have sold parcel B to any number of pharmacies, such as Walgreens or Meijer, and the lease between Rite Aid and BDA would have been no impediment to this, although the easement would have remained in place. BCRED, as the current owner of parcel B, also faces no such impediment.

[8] Exhibit A makes clear that parcel B is not part of the Shopping Center. Exhibit B then gives a metes-and-bounds description of the Shopping Center parcel (a "more particular[]" description) and notes that it is subject to an REA.

Rite Aid contends that another part of the Thompson parcel, hereinafter referred to as "parcel C," is encompassed by the phrase "additions or extensions" in the lease. Rite Aid cites a lease provision indicating that the landlord agrees to pay real-estate taxes levied against the land and buildings comprising the Shopping Center and argues that parcel C is now a "land extension" of the Shopping Center. But "Shopping Center" has been given a particular description in the lease. There is, quite simply, no basis from which to conclude that parcel C is an "addition[] or extension[]" of the Shopping Center merely because it is located in the same general area. Again, the lease states that parcel B "does not belong to shopping center," and parcel C is even further removed from parcel A than is parcel B. Rite Aid's argument is without merit.

Rite Aid cites various nonbinding cases to argue that the "exclusive mercantile rights" provision in the lease must extend to the Thompson parcel because the latter later came under common ownership with parcel A. Plaintiffs argue that Rite Aid is wrong on the facts and that BDA owns parcel A, while BCRED owns the Thompson parcel. However, even assuming common ownership, we decline to rely on nonbinding case law to reverse the trial court's decision when that decision was properly based on an application of clear contractual language. See, generally, *City of Grosse Pointe Park*, 473 Mich at 198.

Rite Aid's next issue deals with restrictions in a 1979 REA applicable when Thompson purchased parcel B. Rite Aid states that the restrictions explicitly "run with the land" and require the following: a maximization of parking spaces on parcel B, a free flow of traffic between parcels A and B, and no future buildings (aside from the existing Pizza Hut)[9] on parcel B. To counter plaintiffs' argument that Rite Aid preserved only the "buildings" argument for appeal, Rite Aid cites various documents in the lower-court record, but our review shows that the only 1979 restriction argument adequately preserved by Rite Aid was indeed the "buildings" argument. Thus, we limit our analysis to this argument. See *Hogg v Four Lakes Ass'n, Inc*, 307 Mich App 402, 406; 861 NW2d 341 (2014).

As noted, the trial court ruled that Rite Aid's argument was countermanded by an amendment to the REA stating that the respective parties could erect buildings on their properties and that such an action would "fully and forever release the property so constructed upon from any claim or easement herein created." Rite Aid claims that the trial court erred in making this ruling because Rite Aid was not a party to the amendment, which was agreed to by Thompson and Battle Creek Plaza. Rite Aid cites an out-of-state case and a treatise to argue that "[b]uilding and use restrictions may only be voluntarily terminated by the mutual agreement of <u>all</u> persons interested in them." Rite Aid contends that the 1979 document remains in effect. The document states, in part:

> [Thompson] shall not build, construct or erect any building, structure or improvement on the land, except those as may be permitted by ordinance and restrictions, so long as, and only if, such are situated within the boundaries

[9] Rite Aid misconstrues the actual wording of the "buildings" provision, which we quote later in this opinion.

> marked in red on Exhibit D [i.e., parcel B] . . . . Provided, further, any building, structure or improvement which [Thompson] builds, constructs or erects on the land (in accordance with the restrictions set forth in the preceding sentence) shall not be more than two stories in height, shall not contain more than five thousand (5000) square feet on the ground floor thereof (excluding any basement floor area), and shall comply with all applicable governmental codes, ordinances and laws.

Rite Aid claims that although the CVS store will largely be located on parcel C (which is not subject to the 1979 provisions), the site plan shows a "pharmacy enclosure" and a possible "loading dock" on parcel B.

Even assuming that the 1979 provisions remain in effect and even assuming a "pharmacy enclosure" and possible "loading dock" on parcel B, Rite Aid has simply not established how these violate the "building" paragraph cited above, which is the only part of the current appellate issue that Rite Aid preserved for review.[10]

Rite Aid has not established any entitlement to appellate relief.

Affirmed.

/s/ Mark T. Boonstra
/s/ Patrick M. Meter
/s/ Michael F. Gadola

[10] Even if we were to review the unpreserved arguments, the plain-error standard would apply, *Hogg*, 307 Mich App at 406, and Rite Aid has established no "clear or obvious" error, see *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). We further note that we decline to address the estoppel arguments Rite Aid makes in its reply brief. See *Bronson Methodist Hosp v Michigan Assigned Claims Facility*, 298 Mich App 192, 199; 826 NW2d 197 (2012) (appellants are not to raise issues for the first time in a reply brief).