

STATE OF MICHIGAN
COURT OF APPEALS

PAYROLL 1, INC.,

Plaintiff/Counter Defendant-
Appellant,

v

DELTA CONTRACTING GROUP, INC.,

Defendant/Counter Plaintiff-
Appellee.

UNPUBLISHED
March 19, 2013

No. 306143
Oakland Circuit Court
LC No. 2010-009232-AV

Before: CAVANAGH, P.J., and SAAD and SHAPIRO, JJ.

PER CURIAM.

Plaintiff appeals by leave granted an order of the circuit court reversing, in part, a judgment of the district court in this contract dispute. We reverse and remand for reinstatement of the district court's judgment.

The facts are largely undisputed. Plaintiff paid a security deposit of \$21,674.13 when it entered into a commercial lease with defendant's predecessor in 1992. In 2003, a new five-year lease was negotiated. In March 2007, defendant acquired the leased premises, but plaintiff's tenancy continued. Upon expiration of the final lease agreement, in November 2008, plaintiff vacated the premises and requested the return of its security deposit. Thereafter, defendant provided plaintiff with a final accounting which included, in relevant part, charges for electricity in the amount of \$14,905.98. Plaintiff denied that it owed the charges, and filed a breach of contract action in the district court. Defendant filed a counterclaim.

Subsequently, a bench trial was conducted. Plaintiff contended that it had always paid the individually metered electricity charges that the utility company directly billed to it, but no other electricity charges. Defendant contended that plaintiff owed for all the electricity it used, not just the electricity billed to plaintiff by the utility company. Defendant admitted that it never raised the issue of outstanding electricity charges until after plaintiff sought the return of its security deposit.

After considering the lease agreement, the district court held that its last two sentences created an ambiguity because it could "think of about three different ways one might interpret what that means." It was undisputed, the district court noted, that plaintiff paid the electricity bills it received from the utility company, but did not pay for any other electricity charges during

the several-year lease. And defendant never billed plaintiff for additional electricity charges until plaintiff requested the return of its security deposit. Thereafter, the district court granted a judgment in favor of plaintiff, holding that plaintiff was entitled to the return of its security deposit.

Defendant appealed the judgment to the circuit court. In relevant part, the circuit court construed the district court's decision as premised on the fact that defendant "failed to make a timely demand, and thus had waived its rights under the lease." The circuit court held that the "lease does not require the landlord to seek payment immediately, nor does the lease set forth any time within which demand for payment must be made." The circuit court concluded that the "trial court clearly erred in finding the failure to seek payment within an unspecified time somehow operated to waive Defendant's right to collect payment which was clearly due under the terms of the lease." Accordingly, the circuit court reversed the district court's judgment and entered a judgment in defendant's favor in the amount of the outstanding electricity charges, \$14,905.98. After plaintiff's motion for reconsideration was denied, plaintiff applied for leave to appeal to this Court and the application was granted. *Payroll 1 Inc v Delta Contracting Group Inc*, unpublished order of the Court of Appeals, entered May 15, 2012 (Docket No. 306143).

Plaintiff argues that the circuit court erred in reversing the district court and finding that plaintiff was responsible for the outstanding electricity charges because the district court properly concluded that the applicable lease provision was ambiguous and properly relied on extrinsic evidence to ascertain the intent of the parties. We agree.

This Court reviews for clear error the trial court's findings of fact following a bench trial, but questions of law and issues of contract interpretation are reviewed de novo. *Trader v Comerica Bank*, 293 Mich App 210, 215; 809 NW2d 429 (2011).

The primary goal of contract interpretation is to determine and enforce the parties' intent. *Dobbelaere v Auto-Owners Ins Co*, 275 Mich App 527, 529; 740 NW2d 503 (2007). "A contract must be interpreted according to its plain and ordinary meaning." *Holmes v Holmes*, 281 Mich App 575, 593; 760 NW2d 300 (2008). Clear and unambiguous contractual language must be enforced as written. *Holland v Trinity Health Care Corp*, 287 Mich App 524, 527; 791 NW2d 724 (2010). However, if the language of a contract is ambiguous, its meaning is a question of fact to be determined by the trier of fact. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 469; 663 NW2d 447 (2003). In that regard, the finder of fact may consider relevant extrinsic evidence, including the parties' conduct, statements, and past practice to aid in interpretation. *Id.* at 469-470. "A contract is said to be ambiguous when its words may reasonably be understood in different ways." *Raska v Farm Bureau Mut Ins Co of Mich*, 412 Mich 355, 362; 314 NW2d 440 (1982).

The provision of the lease agreement at issue states:

The Landlord will provide maintenance of the building structure and will maintain mechanical equipment, i.e., furnace, air conditioning, hot water heaters, lighting, and lighting fixtures, and all common area maintenance at no cost to tenant. The costs for grounds care (e.g., snow removal, lawn care, etc.), insurance for casualty loss, liability etc., real estate taxes, utilities except electricity (i.e.,

water, natural gas) are to be paid by Landlord. Individually metered utilities for Tenant's premises are to be billed and paid by the Tenant in accordance with the requirement of the utility company as the case may be.

We agree with the district court that the language in the last two sentences creates an ambiguity. While the preceding sentence states that the cost of certain items are to be paid by the landlord, including "utilities except electricity," the last sentence states that "[i]ndividually metered utilities for the Tenant's premises are to be billed and paid by the Tenant in accordance with the requirement of the utility company" Reasonable interpretations include that (1) the tenant is only responsible for the metered electricity charges directly billed by the utility company, (2) the tenant is responsible for all electricity charges associated with the premises, even for the space unoccupied by the tenant, or (3) the tenant is responsible for all electricity charges associated with the space it occupies, whether billed by the utility company or not.

Because the applicable lease provision is ambiguous, a question of fact existed regarding the intent of the parties with respect to the payment of electricity charges. See *Klapp*, 468 Mich at 469 (citation omitted). Thus, the district court properly turned to relevant extrinsic evidence, including the parties' conduct and past practices, to determine the intent of the parties. *Id.* at 469-470 (citations omitted). The district court noted that the evidence was undisputed—during the term of the several-year lease, plaintiff only paid for electricity that was directly billed by the utility company. Although defendant acquired the property in March 2007, defendant paid for all other electricity associated with the premises, and did not seek payment from plaintiff related to those charges until after plaintiff vacated the premises and requested the return of its security deposit. Thus, the district court concluded, the parties intended that plaintiff only be responsible for electricity charges directly billed to it by the utility company. See *Klapp*, 468 Mich at 469. Contrary to the circuit court's holding, the district court did not improperly import a "waiver" requirement into the lease agreement. As the trier of fact, the district court construed the ambiguous agreement after making a factual determination regarding the parties' intent, as ascertained from extrinsic evidence. In light of the evidence, we cannot conclude that the district court's holding was erroneous. Thus, the circuit court's judgment is vacated and the matter is remanded for reinstatement of the district court's judgment.

Reversed and remanded for reinstatement of the district court's judgment. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Henry William Saad
/s/ Douglas B. Shapiro