

STATE OF MICHIGAN
COURT OF APPEALS

LARS ASSOCIATES, LLC,

Plaintiff-Appellant,

v

PAMIDA STORES OPERATING CO, LLC,

Defendant-Appellee.

UNPUBLISHED

January 29, 2013

No. 308984

Washtenaw Circuit Court

LC No. 10-001351-CZ

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

PER CURIAM.

In this dispute about an early termination clause in a lease, plaintiff Lars Associates, LLC (Lars) appeals as of right the trial court's order granting summary disposition to defendant Pamida Stores Operating Co., LLC (Pamida). The trial court determined that the conditions of the clause were met, and that therefore Pamida did not wrongfully assert its right to terminate the lease early under the parties' contract. We affirm.

I. FACTS

A. BACKGROUND FACTS

In 1993, Pamida's predecessor, Pamida, Inc., leased a 56,850 square-foot area in the Chelsea Shopping Center from Lars's predecessor, Arcus Corporation, for a ten-year term. The lease gave Pamida the option to extend the lease for two additional five-year terms. The lease provided that if Pamida exercised this option, the lease would continue under the same terms and conditions. The lease also included an early termination clause allowed Pamida to terminate the lease if a competitor opened a store in the area:

[Pamida] shall have, hold and enjoy, throughout the terms of this lease, the right to terminate this lease, exercisable in [Pamida's] sole discretion, upon one (1) year's prior written notice to [Lars], in the event that a competitor of [Pamida] shall open a discount department store . . . within ten (10) miles of the demised premises (excepting only a location which may be opened by Meijers [sic] at Zeeb Road and Jackson Road in Scio Township). In addition, in the event that Meijers shall open a competing location at Zeeb and Jackson Roads in Scio Township, [Pamida] shall have the right to terminate this lease, on one year's

notice, in the event that its sales from the Premises do not equal or exceed \$5,250,000 during any Lease Year[.]

In 2001, Meijer opened a store at the intersection of Zeeb and Jackson Roads in Scio Township. In 2002, Pamida extended the lease through August 2008. Pamida's sales did not exceed \$5,250,000 during any lease year from 2005 to 2010.

In September 2007, Lars and Pamida signed a "contribution agreement." Under the contribution agreement, Lars gave Pamida \$32,500 to upgrade the premises, and Pamida extended the lease through August 2013. The agreement also stated that it constituted written notice that Pamida was exercising its option to extend the lease. The parties agreed that the lease remained in effect unless "specifically modified" by the contribution agreement.

In April 2008, Pamida decided to reduce inventory costs and utility expenses by generally reducing the sales area of its stores to either 26,000 or 19,000 square foot models. Pamida decided to reduce the Chelsea store to a 26,000 square foot model. In May 2008, a fire damaged the shopping center and Pamida's store. Following the fire, Pamida reduced the store's selling area to 29,754 square feet.

B. PROCEDURAL HISTORY

In May 2010, Pamida informed Lars that it intended to terminate its lease under the early termination clause. Lars filed a complaint, alleging that Pamida's attempt to terminate the lease early was wrongful and breached the lease. Pamida filed a motion for summary disposition, arguing that the early termination clause applied because both its conditions were met. Lars responded that Pamida could not terminate the lease under that clause because: (1) Pamida irrevocably extended the lease until 2013; (2) Pamida caused one condition to occur when it reduced the sales area at the premises; (3) Pamida did not exercise its rights under the early termination clause within a reasonable time; and (4) the Meijer at Zeeb and Jackson Roads was not a competing location.

The trial court heard arguments on Pamida's motion on February 2, 2012. It determined that the competitive inclusion clause was (1) unambiguous, (2) included two elements, and (3) that Pamida showed that those elements were met. The trial court determined Pamida did not waive its rights under the clause, and that the contribution agreement did not alter that term of the lease. The trial court therefore granted Pamida's motion for summary disposition.

II. GENERAL STANDARDS OF REVIEW

This Court reviews de novo the trial court's determination on a motion for summary disposition.¹ Because the trial court considered documents outside of the pleadings when it decided the motion, we will review the following issues under MCR 2.116(C)(10).²

¹ *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

A party is entitled to summary disposition under MCR 2.116(C)(10) if “there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law.”³ The trial court must consider all the documentary evidence in the light most favorable to the nonmoving party.⁴ A genuine issue of material fact exists if, when viewing the record in the light most favorable to the nonmoving party, reasonable minds could differ on the issue.⁵

III. CONTRACT INTERPRETATION

A. STANDARD OF REVIEW

This Court reviews de novo whether a contract’s language is ambiguous.⁶ This Court also reviews de novo the proper interpretation of a contract.⁷

B. LEGAL STANDARDS

This Court interprets leases like contracts.⁸ If the contract’s language is unambiguous, we interpret the contract as a matter of law.⁹ The goal of contractual interpretation is to honor the parties’ intent and to enforce the contract’s plain terms.¹⁰ We construe contractual terms in context, according to their commonly used meanings.¹¹ We must interpret a contract in a way that gives every word, phrase, and clause meaning, and must avoid interpretations that render parts of the contract surplusage.¹² If no reasonable person could dispute the meaning of the contract’s plain language, we must enforce that language as written.¹³

C. APPLYING THE STANDARDS

Lars first argues that the early termination clause requires Pamida to show that the Meijer at Zeeb and Jackson Roads was a competitor. We conclude that, considering the provision’s

² *Hughes v Region VII Area Agency on Aging*, 277 Mich App 268, 273; 744 NW2d 10 (2007).

³ MCR 2.116(C)(10); *Maiden*, 461 Mich at 120.

⁴ MCR 2.116(G)(5); *Maiden*, 461 Mich at 120.

⁵ *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

⁶ *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003).

⁷ *Id.* at 469.

⁸ See *G&A Inc v Nahra*, 204 Mich App 329, 330; 514 NW2d 255 (1994).

⁹ *Klapp*, 468 Mich at 469.

¹⁰ *Davis v LaFontaine Motors, Inc*, 271 Mich App 68, 73; 719 NW2d 890 (2006).

¹¹ *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 354; 596 NW2d 190 (1990).

¹² *Klapp*, 468 Mich at 468.

¹³ *Harbor Park Market, Inc v Gronda*, 277 Mich App 126, 130-131; 743 NW2d 585 (2007); *Rory v Continental Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005).

context, the only reasonable reading of this clause is that Pamida need not prove that the Meijer at Zeeb and Jackson Roads is a competitor.

The clause allows Pamida to terminate the lease if a competitor opens a discount department store within ten miles of Pamida's store, specifically excluding "a location which may be opened by Meijers at Zeeb Road and Jackson Road in Scio Township." It also allows Pamida to terminate the lease if "Meijers [sic] shall open a competing location at Zeeb and Jackson Roads in Scio Township," and Pamida's sales fall below \$5,250,000 in any lease year. Lars's proposed reading of the clause reading would require Pamida to show that the Meijer at Zeeb and Jackson Roads is a competitor, and that the store is a discount department store. This interpretation would render surplusage the parties' specific exclusion of that Meijer from the first part of the early termination clause. The parties removed the Meijer at Zeeb and Jackson Roads from the general requirements of the early termination clause, and stated specific circumstances under which Pamida could terminate its lease early because of that specific Meijer. Specific contractual provisions normally override general ones.¹⁴ We conclude that the trial court did not err when it interpreted the words "competing location" as descriptive of the Meijer at Zeeb and Jackson Roads, instead of as an additional requirement. The only reading of the provision that would not render other parts of the clause surplusage is that the clause contains two requirements: (1) that the anticipated Meijer did in fact open at Zeeb and Jackson Roads, and (2) that Pamida's sales were below \$5,250,000 in any lease year.

Lars also argues that the competitive exclusion clause does not apply because Pamida's reduction of store size caused the store to remain below \$5,252,000 profits, and thus caused the second condition of the early termination clause to occur. A party may not cause the failure of a contractual condition.¹⁵ Pamida's profits first fell below \$5,250,000 in 2005, and remained below that amount until 2010. Pamida did not remodel the store's interior until May 2008. Thus, Lars has not shown that Pamida's remodeling caused this condition to occur, because Pamida's profits were below \$5,250,000 for at least three lease years before Pamida remodeled.

We conclude that the trial court did not err when it determined that there was no genuine issue of material fact whether the conditions in the competitive exclusion clause had occurred. Meijer did in fact open a location at Zeeb and Jackson Roads and Pamida's profits were in fact below \$5,250,000 during a lease year. Thus, Pamida showed that the conditions of the early termination clause were met, and it was entitled to judgment as a matter of law.

¹⁴ *Holmes v Holmes*, 281 Mich App 575, 596; 760 NW2d 300 (2008).

¹⁵ *Harbor Park Market, Inc*, 277 Mich App at 131.

IV. WAIVER

A. STANDARD OF REVIEW

This Court reviews de novo the legal effect of a contractual clause.¹⁶ As discussed above, we review de novo the trial court's decision on a motion for summary disposition, viewing the documentary evidence in the light most favorable to the nonmoving party.¹⁷

B. LEGAL STANDARDS

A party may invoke common-law defenses to avoid a contract's enforcement.¹⁸ Waiver is such a common law defense.¹⁹ “[M]utuality is the centerpiece to waiving or modifying a contract, just as mutuality is the centerpiece to forming any contract.”²⁰ A party has shown mutuality when the party has “established through clear and convincing evidence of a written agreement, oral agreement, or affirmative conduct establishing mutual agreement to modify or waive the particular original contract.”²¹

A contract is ambiguous when its provisions are capable of conflicting interpretations.²² If a contract is not ambiguous, we must enforce it as written.²³ The parties' dispute about the language of the contract does not render the contract ambiguous.²⁴

C. APPLYING THE STANDARDS

Lars argues that Pamida expressly waived the early termination clause when it signed the contribution agreement. We disagree because the only reasonable meaning of this language is that Pamida agreed to extend the lease, not that Pamida agreed never to terminate the lease. We reiterate that a contract is ambiguous if it is capable of two or more possible *reasonable* meanings.²⁵ This Court will not create ambiguity where none exists.²⁶

¹⁶ *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 369; 666 NW2d 251 (2003).

¹⁷ *Id.*

¹⁸ *Titan Ins Co v Hyten*, 491 Mich 547, 554; 817 NW2d 562 (2012).

¹⁹ *Id.* at 554-555.

²⁰ *Quality Products & Concepts Co*, 469 Mich at 364.

²¹ *Id.* at 364-365.

²² See *Farm Bureau Mut Ins Co of Mich v Nikkel*, 460 Mich 558, 566; 596 NW2d 915 (1999).

²³ *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich at 372, quoting *Rory*, 473 Mich at 470.

²⁴ *Id.* at 567.

²⁵ *Id.* at 566.

Lars argues that because Pamida “irrevocably exercise[d] its second option to extend the term of the Lease for an additional five (5) years[.]” Pamida could not terminate the lease for the next five years. But the clear meaning of this language is that Pamida irrevocably exercised its option to extend the lease: the adverb “irrevocably” was clearly modifying the verb “exercise,” which had the subject of Pamida’s “second option.” Lars’s proposed meaning, that this language may have made the lease itself irrevocable, is simply not reasonable. We conclude that the word “irrevocably” does not make the second paragraph of the contribution agreement ambiguous, and did not render the lease itself irrevocable.

We also conclude that Lars has not shown that the contribution agreement waived the early termination clause of the original contract. A waiver is a “voluntary and intentional abandonment of a known right.”²⁷ The party arguing waiver must establish clear and convincing evidence that the other party intended to waive the contractual provision.²⁸ To show that Pamida waived its rights under the competitive exclusion clause, Lars must provide clear and convincing evidence of the parties’ mutual agreement to waive the original contract.

Here, the parties’ contribution agreement stated that the original lease “remain[ed] unchanged and in full force and effect except to the extent specifically modified by this agreement.” The contribution agreement did not specifically modify the early termination clause. The contribution agreement only specifically mentions Pamida’s option to extend the lease for a second term. Thus, we conclude that Lars has not shown that this subsequent written agreement establishes that Pamida waived its rights under the early termination clause.

Lars also argues that Pamida waived the early termination provision under the competitive exclusion clause by waiting too long to assert its rights under the clause. Forfeiture is “the failure to assert a right in a timely fashion.”²⁹ A party’s forfeiture alone is not sufficient to show the mutual assent that constitutes a waiver of a contractual term.³⁰ Thus, even were we to conclude that Pamida failed to assert its rights in a timely fashion—and we do not—this argument does not support Lars’s position that Pamida waived its rights under the early termination clause. We conclude that Lars did not show clear and convincing evidence that Pamida waived its rights under the early termination clause, and that the trial court properly granted summary disposition.

We affirm.

/s/ William C. Whitbeck
/s/ Henry William Saad

²⁶ *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 111; 595 NW2d 832 (1995).

²⁷ *Quality Concepts & Products Co*, 469 Mich at 374.

²⁸ *Id.* at 364-365.

²⁹ *Id.* at 379.

³⁰ *Id.* at 379.