STATE OF MINNESOTA
IN COURT OF APPEALS
A10-895

C. W. Birch Run, LLC,
a Delaware limited liability company,
Respondent,

vs.

Jo-Ann Stores, Inc.,
an Ohio corporation,
Appellant.

Filed December 14, 2010
Affirmed
Klaphake, Judge

Ramsey County District Court
File No. 62-CV-09-12397

Jason R. Asmus, Aaron G. Thomas, Briggs and Morgan, P.A., Minneapolis, Minnesota (for respondent)

Michelle E. Weinberg, Eleasalo V. Ale, Faegre & Benson, LLP, Minneapolis, Minnesota (for appellant)

Considered and decided by Klaphake, Presiding Judge; Halbrooks, Judge; and Connolly, Judge.

U N P U B L I S H E D O P I N I O N

KLAPHAKE, Judge

Appellant Jo-Ann Stores, Inc., challenges the district court's summary judgment in favor of its landlord, respondent C.W. Birch Run, LLC, arguing that the district court

erred in its construction of the parties' lease agreement and that the district court should have considered evidence extrinsic to the agreement.

Because the district court's interpretation of the contract is supported by plain and unambiguous language of the contract, we affirm.

FACTS

Appellant operates a store in Maplewood in the Birch Run Shopping Center. Appellant entered into a ten-year lease for the premises in 2000. Respondent purchased the shopping center in 2004, assuming all rights and responsibilities of its predecessor under the lease.

Respondent's predecessor owned most, but not all, of the shopping center. At issue in this matter is the so-called "Toys Parcel," which was owned by Toys R Us, Inc.[1] When appellant signed its lease, the Toys Parcel was not owned by respondent's predecessor.

The lease agreement included certain definitions, two of which are critical here. First, "Shopping Center" is defined as "the Birch Run Station located at Beam Avenue, Maplewood, Minnesota consisting of all buildings including the Premises [defined as appellant's store], Common Areas and the outparcels, and other improvements upon the Shopping Center Site."

Second, "Shopping Center Site" is defined as "the land (inclusive of outparcels) described on 'Exhibit A,' on which the Shopping Center is located." "Exhibit A" defines

[1] At least one other parcel was owned by another party, but that parcel is not relevant here.

the land to exclude the Toys Parcel. Thus "Shopping Center" is defined as the buildings and other improvements on land exclusive of the Toys Parcel.

Under a section of the lease, respondent's predecessor, as landlord of the Shopping Center, agreed it would not lease to a second hand or used goods store. Respondent's predecessor also had an agreement with Toys R Us, called the Reciprocal Easement and Operation Agreement (REOA), signed January 29, 1991. Under the terms of the REOA, respondent's predecessor and Toys R Us agreed that neither party to the REOA would lease premises to a second hand or used goods store. Appellant is not a party to the REOA.

In August 2004, respondent acquired both the Shopping Center Site, as that term is defined in the lease, and the Toys Parcel. By doing so, respondent became the only party to the REOA. On December 1, 2005, respondent amended the REOA by eliminating the prohibition against leasing to a second hand or used goods store. On December 9, 2005, respondent leased the Toys Parcel to T.V.I., Inc., for a Savers Store, which sells second hand and used goods. In November 2009, appellant sued respondent for a violation of the lease terms and indicated that it would exercise its option under the lease to pay reduced rent, although it subsequently backed away from this position.

Both parties moved for summary judgment and indicated to the district court that there were no disputed fact issues and that the lease was unambiguous. The district court issued its findings, conclusions, and order for summary judgment in favor of respondent.

D E C I S I O N

Standard of Review

The district court must grant summary judgment when, based on the entire record before the court, there are no genuine issues of material fact and either party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. If summary judgment is based on the application of law to undisputed facts, we review the judgment de novo as a legal conclusion. *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 371 (Min. 2008).

The interpretation of an unambiguous contract is a question of law. *City of Va. v. Northland Office Props. Ltd. P'ship*, 465 N.W.2d 424, 427 (Minn. App. 1991), *review denied* (Minn. Apr. 18, 1991). Unambiguous contract language is given its plain and ordinary meaning. *State v. Philip Morris USA, Inc.*, 713 N.W.2d 350, 355 (Minn. 2006). Courts construe a contract to determine and enforce the intent of the parties. *Travertine Corp. v. Lexington-Silverwood*, 683 N.W.2d 267, 271 (Minn. 2004). Both parties here agreed that the contract was unambiguous.

Construction of the Lease Agreement

The district court concluded that "[t]he language of [the section prohibiting certain uses] is plain and unambiguous and prohibited certain uses at sites in the Shopping Center which does not include the Toys Parcel." The court further concluded that the parties to the lease were "sophisticated commercial entities who the Court can reasonably assume understood and accepted the plain and unambiguous language of the Lease. This would include an understanding that [this section] of the Lease prohibited certain uses only within the Shopping Center and would not extend to stores located on the Toys

Parcel." Appellant contends that the district court erred in interpreting the lease because it interpreted the term "Shopping Center" too narrowly and that the court's interpretation renders other terms of the lease meaningless.

While the primary goal of contract interpretation is to give effect to the intent of the parties, the intent of the parties is determined from the plain language of the contract. *Travertine Corp*., 683 N.W.2d at 271. "Where the terms of a contract are clear and unambiguous, there is no room for construction or interpretation." *Colangelo v. Norwest Mortg., Inc.*, 598 N.W.2d 14, 18 (Minn. App. 1999) (quotation omitted), *review denied* (Minn. Oct. 21, 1999). Contracts are construed as a whole and an attempt must be made to harmonize all the clauses of a contract. *National City Bank v. Engler*, 777 N.W.2d 762, 765 (Minn. App. 2010), *review denied* (Minn. Apr. 20, 2010).

The term "Shopping Center," as defined, incorporates the concept of "Shopping Center Site." "Shopping Center Site" is specifically defined to mean the land described on Exhibit A to the lease; the legal description in Exhibit A excludes the Toys Parcel. The term "Shopping Center" thus cannot be understood without reference to the term "Shopping Center Site." This is further reinforced by the language of Section 1(a) of the lease, which incorporates Exhibit A into the lease and which is described as a "description of the lands upon which the Shopping Center is constructed."

Appellant argues that punctuation in the definition of "Shopping Center" suggests that the lease also controls the Toys Parcel. Specifically, appellant says the phrase "other improvements," which follows a comma, is an independent clause to be distinguished from the buildings and common areas of the Shopping Center, and that therefore the

phrase "other improvements" must refer to the Toys Parcel. But punctuation is a slender reed on which to rely; generally, punctuation yields to the language of the text. *Holmes v. Phenix Ins. Co. of Brooklyn, N.Y.*, 98 F. 240, 241 (8th Cir. 1899). The reviewing court cannot ignore the context of the language or common sense. *Mutual Serv. Cas. Ins. Co. v. Wilson Twp.*, 603 N.W.2d 151, 153 (Minn. App. 1999) (noting that terms should be construed in "plain, ordinary, fair, usual, popular sense, rather than philosophical, literal, or technical sense"), *review denied* (Minn. Mar. 14, 2000).

Second, appellant argues that the definition of "Gross Leasable Area" clearly includes the Toys Parcel because of the size, 293,376 square feet. But another clause of the lease refers to "Gross Leasable Area" in three ways, depending on the usage; for purposes of taxation and insurance, the "Gross Leasable Area" reflects a size without inclusion of the Toys Parcel, but includes the Toys Parcel for calculation of "Common Area Costs."

Finally, appellant argues that the Birch Run Station shopping area looks like a unified site, with unified signage, and that the lease gives protections that make no sense unless applied to the entire site. But the appearance of the shopping center cannot alter the unambiguous terms of the contract, and the lease clauses can only be understood to convey the protections the landlord can legally offer. Thus, respondent's predecessor could agree to maintain areas for which it bore responsibility and prohibit or protect uses in the areas owned by it; it could not regulate or control land it did not own. From a common sense point of view, a non-owner of land would be unable to control an

otherwise legal use of land occurring on someone else's land.[2] *See Black's Law Dictionary* 1214 (9th Ed. 2009) (defining "owner" as "[o]ne who has the right to possess, use, and convey something"); 1215 (defining "ownership" as "[t]he bundle of rights allowing one to use, manage, and enjoy property, including the right to convey it to others . . . [o]wnership implies the right to possess a thing"); 1281 (defining "possession" as "[t]he fact of having or holding property in one's power . . .[t]he right under which one may exercise control over something to the exclusion of all other").

The district court did not err by construing the lease agreement to apply only to that part of the Shopping Center and Shopping Center Site owned by respondent's predecessor at the time the lease was signed. As such, the lease term prohibiting rental to a second hand or used goods store does not apply to the Toys Parcel, which was not part of the Shopping Center or Shopping Center Site, as those terms are defined in the lease agreement, at the time the lease was signed.

Use of Extrinsic Evidence

Appellant argues that the district court erred by refusing to use extrinsic evidence to clarify terms of the lease agreement. When construing a contract, the district court does not consider extrinsic evidence unless a contract is ambiguous on its face. *Minn. Teamsters Pub. & Law Enforcement Emps. Union, Local 320 v. County of St. Louis*, 726 N.W.2d 843, 847 (Minn. App. 2007), *review denied* (Minn. Apr. 25, 2007). Extrinsic

[2] In reality, respondent's predecessor had the REOA agreement with the former owner of the Toys Parcel, in which the parties agreed on aspects of common area maintenance, unified appearance, and certain prohibited or protected uses. Appellant, however, is not a party to this contract and sued here under the lease, not as a potential beneficiary of the REOA.

evidence may not be used to create an ambiguity that does not exist on the face of the contract. *Id.* at 847-48. "A contract is ambiguous if it is susceptible of more than one construction." *In re Hennepin County 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 498 (Minn. 1995).

All parties concede that the agreement here was unambiguous. There is no reason to deviate from the general and well-accepted rule that excludes consideration of extrinsic evidence when a contract is not ambiguous.

Because we conclude that respondent has not violated the terms of the lease agreement, we do not address appellant's argument that it should be allowed to pay substitute rent under a clause of the lease permitting a tenant to pay reduced rent if the landlord violates a covenant of the lease.

Affirmed.