[Cite as *Rite Aid of Ohio, Inc. v. Monroe/Laskey Ltd. Partnership, L.L.C.*, 2010-Ohio-691.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Rite Aid of Ohio, Inc.	Court of Appeals No. L-09-1179
Appellant	Trial Court No. CI08-3287
v.	
Monroe/Laskey Limited Partnership, LLC	**DECISION AND JUDGMENT**
Appellee	Decided: February 26, 2010

* * * * *

Anthony J. Calamunci and Amy L. Butler, for appellant.

Marvin A. Robon and R. Ethan Davis, for appellee.

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PIETRYKOWSKI, J.

{¶ 1} Appellant, Rite Aid of Ohio, Inc. ("Rite Aid"), appeals a judgment, journalized on June 3, 2009, of the Lucas County Court of Common Pleas. The judgment granted a motion for summary judgment of appellee, Monroe/Laskey Limited

Partnership, LLC ("Monroe/Laskey"), on liability in an action for damages based upon claimed breach of contract and unjust enrichment.

{¶ 2} Rite Aid is the lessee and Monroe/Laskey is the lessor in a commercial lease of real property located at 3466 West Sylvania Avenue in Toledo, Ohio. A portion of the property that is subject to the lease was taken by the city of Toledo by eminent domain, during the lease term. In *Rite Aid of Ohio, Inc. v. Monroe/Laskey Ltd. Partnership,* 6th Dist. No. L-08-1039, 2009-Ohio-519 ("*Rite Aid I"*), we considered an appeal of a declaratory judgment action brought by appellant to determine whether it was entitled to terminate the lease due to the taking. We held that the lease was clear and unambiguous in setting forth the conditions under which there was a right to terminate the lease due to eminent domain. Id. at ¶ 35. We also held that the conditions presented by the taking by the city of Toledo did not meet the specified conditions under the lease for a right to terminate to arise. Id. at ¶ 34-37.

{¶ 3} Subsequently, Rite Aid initiated this litigation, claiming that the taking by eminent domain resulted in a breach of the lease contract by Monroe/Laskey and that Monroe/Laskey was unjustly enriched by continuing to receive full rental payments despite loss of a portion of the real property that was subject to the lease. Rite Aid asserts that the trial court erred in granting Monroe/Laskey's motion for summary judgment on the claim. It asserts one assignment of error on appeal:

{¶ 4} "The Trial Court erred in granting Monroe/Laskey's request for summary judgment since Rite Aid has an equitable claim for devaluation of the leasehold estate."

{¶ 5} The standard of review of judgments granting motions for summary judgment is de novo; that is, an appellate court applies the same standard in determining whether summary judgment should be granted as the trial court. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. Civ.R. 56(C) provides:

{¶ 6} "* * * Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. * * *"

{¶ 7} Summary judgment is proper where the moving party demonstrates:

{¶ 8} "* * * (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor." *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66.

{¶ 9} Material facts, for purposes of motions for summary judgment, are facts "that would affect the outcome of the suit under the applicable substantive law. *Needham v. Provident Bank* (1996), 110 Ohio App.3d 817, 826, 675 N.E.2d 514, 519-520, citing *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91

L.Ed.2d 202, 211-212." *Russell v. Interim Personnel, Inc.* (1999), 135 Ohio App.3d 301, 304.

{¶ 10} Rite Aid argues that the taking by eminent domain changed the entire configuration of the land and that now it is not receiving the property that it contracted to receive. It claims that the taking "severely decreased the benefits of the entire Lease" and that it nevertheless has been required to pay the same monthly rental payment. It further argues that the lease is silent on the issue of an entitlement to unjust enrichment damages resulting from eminent domain.

{¶ 11} Monroe/Laskey argues that the trial court correctly concluded that it did not breach the lease agreement. It argues that no portion of the leased premises, as defined in the lease, was taken and that the remaining property, after eminent domain proceedings, meets lease requirements. Rite Aid also argues that the lease does not provide for a reduction in rent where eminent domain takes a small portion of the parking lot.

{¶ 12} "The construction of a written contract is a matter of law that we review de novo. *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm* (1995), 73 Ohio St.3d 107, 108, 652 N.E.2d 684. Our primary role is to ascertain and give effect to the intent of the parties. *Hamilton Ins. Serv., Inc. v. Nationwide Ins. Cos.* (1999), 86 Ohio St.3d 270, 273, 714 N.E.2d 898. We presume that the intent of the parties to a contract is within the language used in the written instrument. *Kelly v. Med. Life Ins. Co.* (1987), 31 Ohio St.3d 130, 31 OBR 289, 509 N.E.2d 411, paragraph one of the syllabus. If we are able to determine the intent of the parties from the plain language of the agreement, then there is

no need to interpret the contract. *Aultman Hosp. Assn. v. Community Mut. Ins. Co.* (1989), 46 Ohio St.3d 51, 544 N.E.2d 920." *Saunders v. Mortensen*, 101 Ohio St.3d 86, 2004-Ohio-24, ¶ 9.

{¶ 13} In *Rite Aid I*, we dealt at length with contract terms under the lease with respect to the terms "Premises" and "Property." *Rite Aid I* at ¶ 29-30. We concluded that the lease contract was unambiguous in that "[t]he term 'premises' is defined as the building alone with the term 'property' referring to the land on which it is located." Id. at ¶ 30. We also concluded that under Article 23, where a portion of the building itself or 20 percent or more of the parking spaces is taken by eminent domain, the tenant has the right to terminate the lease. Id. at ¶ 35. A right to terminate also exists where, due to eminent domain, there has been a denial of reasonable access to the building or parking areas for more than 30 days. Id. Under the undisputed facts, none of the circumstances giving rise to a tenant's right to terminate the lease exist in this case.

{¶ 14} Article 23 also specifies when rental charges are to be reduced due to a taking by eminent domain. Article 23 provides for reduced rents where the tenant has the right to terminate the lease due to eminent domain but nevertheless elects to remain. Under such circumstances the lease provides that rent "shall be reduced for the remainder of the term thereafter in proportion to the amount of the Premises taken." Here, the circumstances do not exist that would give rise to a right to terminate the lease and, therefore, there is no right under Article 23 for a reduction in rent.

{¶ 15} We agree with the trial court that this lease contemplates a taking by eminent domain. The lease identifies the rights and obligations of the parties in the event of a taking by eminent domain. Rite Aid does not claim that there has been interference with its continued use of the Rite Aid store building or access to the required number of parking spaces as specified under the lease.

{¶ 16} We conclude that the trial court did not err in determining that there was no dispute of material fact and that the taking by eminent domain did not cause a breach by Monroe/Laskey of its obligations under the lease contract.

{¶ 17} It is well established in Ohio that an express contract covering the same subject matter precludes any claim for unjust enrichment. *Donald Harris Law Firm v. Dwight-Killian*, 166 Ohio App.3d 786, 2006-Ohio-2347, ¶ 14-15; *Harris v. Reiff*, 6th Dist. No. WD-03-056, 2003-Ohio-7264, ¶ 6; *Bumbera v. Hollensen* (Mar. 17, 2000), 6th Dist. No. OT-99-064. The parties' lease dealt specifically with contract obligations in the event of a taking by eminent domain. Accordingly no claim for unjust enrichment exists for claimed devaluation of the leasehold estate as a result of the exercise of eminent domain by the city of Toledo.

{¶ 18} We conclude that the trial court did not err in granting appellee's motion for summary judgment on the breach of contract and unjust enrichment claims. Appellant's Assignment of Error is not well-taken.

{¶ 19} On consideration whereof, the court finds that substantial justice has been done the party complaining and the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Keila D. Cosme, J. _____
CONCUR.
JUDGE