STATE OF MICHIGAN

COURT OF APPEALS

KEITH WEYCKER and KEEFERS BLUE LINE SALOON, INC., Plaintiffs/Counter-Defendants-Appellants,	UNPUBLISHED July 11, 2006
v	No. 264401 Wayne Circuit Court
WALTER MARTIN and LOUISE MARTIN, Defendants/Counter-Plaintiffs-Appellees,	LC No. 04-428123-CH
and	
LUIGI PECCI, Defendant-Appellee.	

Before: Cavanagh, P.J., and Fort Hood and Servitto, JJ.

PER CURIAM.

Plaintiffs appeal by delayed leave granted from an order granting summary disposition to defendants Walter Martin and Louise Martin (collectively referred to as "defendants") based on MCR 2.16(C)(10).[1] We reverse.

Plaintiffs argue that the trial court erred in granting defendants' motion for summary disposition on the basis that the lease agreement between Keefers Blue Line Saloon, Inc., as tenant ("Keefers"), and Walter Martin, as landlord, was ambiguous and was required to be construed against Keefers, because its attorney drafted the lease. We agree.

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[1] Defendants moved for summary disposition under MCR 2.116(C)(8) and (10). Although the trial court did not cite the subrule under which it granted the motion, the court considered evidence beyond the pleadings and, therefore, it is apparent that the motion was granted under MCR 2.116(C)(10). The trial court also granted defendant Luigi Pecci's motion for partial summary disposition, which plaintiffs do not challenge on appeal.

A trial court's grant of summary disposition is reviewed de novo, on the entire record, to determine whether the prevailing party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion brought under MCR 2.116(C)(10), the court must examine the documentary evidence presented below and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 361-362; 547 NW2d 314 (1996). The nonmoving party has the burden of establishing—through affidavits, depositions, admissions, or other documentary evidence—that a genuine issue of disputed material fact exists. *Id.* at 362. A question of fact exists when reasonable minds could differ on the conclusions to be drawn from the evidence. *Glittenberg v Doughboy Recreational Industries (On Rehearing)*, 441 Mich 379, 398-399; 491 NW2d 208 (1992).

"In interpreting a contract, [a court's] obligation is to determine the intent of the contracting parties." *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003). "[A]n unambiguous contractual provision is reflective of the parties' intent as a matter of law." *Id.* "Once discerned, the intent of the parties will be enforced unless it is contrary to public policy." *Id.* "[C]ourts must . . . give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory." *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003). "If the language of the contract is unambiguous, we construe and enforce the contract as written." *Quality Products & Concepts Co*, *supra*. Conversely, a "contract is ambiguous when its provisions are capable of conflicting interpretations." *Klapp*, *supra* at 467.

"[I]f the language of a contract is clear and unambiguous, its construction is a question of law for the court." *Michigan Nat'l Bank v Laskowski*, 228 Mich App 710, 714; 580 NW2d 8 (1998); see also *Klapp*, *supra* at 469. On the other hand, the meaning of an ambiguous contract is a question of fact that must be decided by the trier of fact. *Id.*

In the present case, the lease agreement states, in pertinent part:

> (45) Tenant shall have the first right to purchase the real property upon which the premises are situated ("the Property"), should Landlord desire to sell the same. If, at any time during any term of this Lease, Landlord receives a bona fide offer to purchase the Property, Landlord agrees that prior to accepting the offer, it shall deliver a copy of the offer to Tenant, *who shall* than (sic) *have Thirty* (30) *business days to exercise its rights* hereunder *by agreeing to purchase the property under the same price and terms contained in the bona fide offer*.
>
> (46) Landlord hereby grants to Tenant the Option to purchase the Property described in Paragraph 45, above, at any time, for the price of $350,000.00. Tenant, as a courtesy to Landlord, shall give Landlord notice of its intent to exercise its Option within One (1) year of the date of this Lease. However, Tenant's failure to comply with the preceding sentence shall in no way affect Tenant's rights under this Paragraph. [Emphasis added.]

Paragraph 45 of the lease agreement unambiguously grants Keefers 30 "business" days to exercise its rights under that paragraph "by *agreeing* to purchase the property."[2] That provision does not require Keefers to obtain financing within 30 days, or that the closing take place within 30 days.

The trial court erred when it determined that the lease was ambiguous and was therefore required to be interpreted against plaintiffs, because their attorney drafted the lease. The rule of contra proferentem is not a rule of construction. *Klapp*, *supra* at 475. Rather, "[t]he rule of contra proferentem is a rule of last resort because . . . [it] does not aid in determining the parties' intent." *Id*. at 473. It should be applied only as a tie-breaker, i.e., "merely to ascertain the winner and the loser in connection with a contract whose meaning has . . . [remained unclear] despite all efforts to apply conventional rules of interpretation," including the consideration of extrinsic evidence. *Id*. at 474. Thus, the trial court erred both in finding that the lease was ambiguous and in relying on the rule of contra proferentem to resolve the perceived ambiguity.

The evidence established that Keefers complied with the requirements of ¶ 45 when it agreed to purchase the property within 30 days after receiving notice of Pecci's offer. Furthermore, defendants agreed in writing not to dispute Keefers's interpretation of the lease regarding Keefers's right to purchase the property for $350,000, in accordance with ¶ 46. Therefore, defendants waived any right to insist that Keefers's offer was required to match the terms of Pecci's offer.[3] Compare *Quality Products & Concepts Co*, *supra* at 376.

Plaintiffs argue that defendants violated the lease by selling the property to Pecci after plaintiffs agreed to purchase it. Defendants counter that plaintiffs expressly agreed to the sale.

The lease states that Keefers shall have 30 "business days" to exercise its right of first refusal. Keefers complied with this provision when, on April 12, 2004, it agreed to purchase the property for $350,000. But defendants took the position that Keefers was required to obtain financing and schedule a closing within 30 *calendar* days. Thus, on April 22, 2004, defendants' attorney sent plaintiffs' attorney a letter stating that the 30 days had already expired, and demanding that plaintiffs take action within 48 hours. On April 22, 2004, still within the 30 "business days" provided by the lease, plaintiffs again expressed that they would purchase the property. However, plaintiffs' counsel added:

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[2] We have addressed the thirty-day business day portion of the lease. We do not address the portion of the lease that provided that the purchase was to occur under the same price and terms contained in the bona fide offer. Apparently, in an effort to proceed with the sale, defendants agreed to execute the sale for $350,000 as set forth in paragraph 46.

[3] We find no merit to Pecci's argument that the option to purchase under ¶ 46 was effective only during the first year of the lease. Instead, ¶ 46 states:

> . . . Tenant, *as a courtesy* to Landlord, shall give Landlord notice of its intent to exercise its Option within One (1) year of the date of this Lease. However, *Tenant's failure to comply with the preceding sentence shall in no way affect Tenant's rights under this Paragraph*. [Emphasis added.]

> As previously indicated, my client is aware of your client's current health problems, and is doing what he can to expedite this matter. *Should Mr. Martin choose to sell the property to a third party, he is free to do so*. However, as previously explained, the property will be sold subject to the lease agreement, which provides my client with an option to purchase the property, at any time, for the sum of $350,000.00. [Emphasis added.]

Defendants contend that the highlighted language allowed them to sell the property to Pecci, without repercussions. Conversely, plaintiffs maintain that, read in context, the letter communicated that defendants could sell the property, but at their own peril. Plaintiffs submitted their attorney's affidavit in support of their interpretation.

Defendants are not entitled to summary disposition on this basis. The terms and conditions contained in the lease agreement are at issue in this case. The construction and interpretation of a contract presents a question of law that is reviewed de novo. *Bandit Industries, Inc v Hobbs Int'l Inc (After Remand)*, 463 Mich 504, 511; 620 NW2d 531 (2001). The goal of contract construction is to determine and enforce the parties' intent based on the plain language of the contract itself. *Old Kent Bank v Sobczak*, 243 Mich App 57, 63; 620 NW2d 663 (2000). If the terms of a contract are subject to two or more reasonable interpretations, a factual development occurs for which it is necessary to determine the intent of the parties. *SSC Associates Limited Partnership v Detroit General Retirement System*, 192 Mich App 360, 363; 480 NW2d 275 (1991). The duty to interpret and apply the law is allocated to the courts, not the parties' witnesses. *Hottmann v Hottmann*, 226 Mich App 171, 179; 572 NW2d 259 (1997). When a written contract is silent as to the time of performance, it is presumed, even without reference to parol evidence, that a reasonable time is acceptable. *Walter Toebe & Co v Dep't of State Highways*, 144 Mich App 21, 31; 373 NW2d 233 (1985). What constitutes a "reasonable time" is based on the terms and circumstances of the contract and presents a question of fact. *Id*.

Review of the provisions of the lease agreement at issue reveal that it provided that the tenant had thirty business days to exercise its right of acceptance. However, the lease agreement did not specify the time for completion of the sale. That is, it did not specify the type of financing required for the purchase, the date by which financing had to be obtained, and the date of closing. Consequently, it is presumed that a reasonable time for performance is allowed, and the reasonableness of plaintiffs' actions based on the circumstances of this case present an issue for the trier of fact. *Walter Toebe & Co, supra*. Defendants' reliance on the letter submitted by plaintiffs' counsel is without merit. The duty to interpret and apply the law presents a question of law for the court. *Hottmann, supra*. Moreover, defendants ignore the portion of the letter wherein it was stated that the property could be sold to a third party *subject to* the terms of the lease agreement that contained an option to purchase the property. Accordingly, we reverse the trial court's order granting summary disposition to defendants Walter and Louise Martin, and remand for further proceedings.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood
/s/ Deborah A. Servitto