STATE OF MICHIGAN

COURT OF APPEALS

KMART OF MICHIGAN, INC.,

Plaintiff-Appellant,

v

250 MARTIN INVESTMENTS, LLC, JOHN SHEKERJIAN, and JANET SHEKERJIAN,

Defendants-Appellees.

UNPUBLISHED
April 14, 2005

No. 251378
Oakland Circuit Court
LC No. 2002-044442-CZ

Before: Donofrio, P.J., and Murphy and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's orders granting summary disposition in favor of defendants. Plaintiff, Kmart of Michigan, Inc. ("Kmart"), brought this contract action seeking damages from defendants, 250 Martin Investments, LLC ("Martin"), John Shekerjian, and Janet Shekerjian. The trial court initially granted partial summary disposition, finding that parol evidence was inadmissible to alter the terms of the agreement and that a fee increase under the agreement to be applied after a certain date was an unenforceable penalty provision. The trial court subsequently granted summary disposition with respect to the last remaining issue, finding that plaintiff was not owed any outstanding damages. We reverse and remand.

Plaintiff leases property located in Birmingham, Michigan. That property neighbors property owned by Martin.[1] In approximately the early summer of 2001, Martin prepared to make improvements to its property. These preparations included contacting plaintiff to arrange for licensing the use of a portion of plaintiff's parking lot on which it planned to build a barricade to protect people utilizing the parking lot as well as using it as a general construction staging area. Oliver-Hatcher Construction and Development, Inc. (OHCD), was to undertake and complete the construction work. On August 31, 2001, the parties entered into an agreement pursuant to which Martin and OHCD gained the right to use a twenty by fifty foot section of the

[1] Defendants John and Janet Shekerjian were brought into this suit as guarantors of payment.

parking lot (referred to as the temporary construction access area). The pertinent portions of the contract provide as follows:

> E. 250 Martin Investments desires: (i) during a ten (10) month period, to demolish the existing building on the 250 Martin Investments parcel . . . .
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> * * *
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> NOW, THEREFORE, in consideration of the mutual benefits and the covenants contained herein, the parties hereto agree as follows:
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> 1. Grant of License. In consideration of the sum of Five Thousand and No/100 Dollars ($5,000.00) per month ("License Fee") . . . Kmart grants to 250 Martin Investments and OHCD, and 250 Martin Investments and OHCD's agents, employees, contractors, subcontractors, and vendors a temporary, non-exclusive license (the "Construction Work License") to enter upon the Temporary Construction Access Area . . ., and to cross over the Temporary Construction Access Area in connection with the performance by 250 Martin Investments or OHCD of the Construction Work. . . . Martin Investment's obligation to pay the License Fee terminates when this Construction License terminates pursuant to Paragraph 4. . . .
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> * * *
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> 4. Term. The Construction Work License shall terminate upon the completion of the Construction Work and the satisfaction by 250 Martin Investments (as reasonably determined by Kmart) of all the terms and conditions of this Agreement. If on May 31, 2002 (the "Scheduled Completion Date"):
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> (a) The Construction Work is not fully completed; and
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> (b) All of the Post-Construction Work Obligations (as hereinafter defined) are not satisfied in full;
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> 250 Martin Investments shall pay Kmart an amount equal to One Thousand and No/100 Dollars ($1,000.00) for each day thereafter that this Agreement remains in effect. 250 Martin Investments, OHCD, and Kmart acknowledge that time is of the essence in this Agreement. Notwithstanding anything to the contrary contained in this Agreement, Kmart may terminate this Agreement after the Scheduled Completion Date, irrespective of whether the Construction Work is complete or whether the Post-Construction Work Obligations under this Agreement have been satisfied, if Kmart notifies 250 Martin Investments or OHCD of a default under this Agreement and 250 Martin Investments or OHCD fails to cure such default within five (5) days after the date of notice (except a default for holding over which occurs on or before September 30, 2002, so long as full payment is being made timely hereunder).

Additionally, on August 31, 2001, John and Janet Shekerjian executed a guaranty relative to the contract, promising full performance if either OHCD or Martin defaulted, including the payment of any consequential damages such as costs, expenses, or attorney fees.

The construction was not completed by May 31, 2002, and Martin and OHCD continued to use the property through October 2002. Martin also continued to pay plaintiff $5000 per month through September 2002 and did not pay the increased daily rate called for under the agreement. In October 2002, plaintiff brought suit against Martin, claiming it breached the agreement by failing to pay in full, and against John and Janet Shekerjian for enforcement of the guaranty. On April 25, 2003, plaintiff filed a motion for partial summary disposition under MCR 2.116(C)(8), seeking to resolve the issues of whether the increased usage fee after May 31, 2002, constituted an impermissible penalty and whether parol evidence could be introduced to alter the terms of the contract.

On June 11, 2003, a hearing on the motion was held at which the trial court found that parol evidence was not admissible because there was a valid merger clause in the agreement and no allegations of fraud were made concerning that clause, and that the increased fee was an impermissible penalty because it was not identified as a license fee and was unreasonable in amount. Defendants subsequently moved for summary disposition under MCR 2.116(C)(10), arguing that no factual issues existed because the trial court's prior ruling meant that all of the contractual obligations to plaintiff had been fulfilled.[2] The court agreed and granted summary disposition in favor of defendants. Plaintiff now appeals and requests that this Court reverse the decision of the trial court and find that the increased fee after May 31, 2002, was not an unenforceable penalty, or in the alternative that this Court remand the case for trial so that it may prove its damages.

This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Klapp v United Ins Group Agency, Inc,* 468 Mich 459, 463; 663 NW2d 447 (2003). Further, the proper interpretation of a contract is a question of law that is reviewed de novo. *Id.*

In *Wilkie v Auto-Owners Ins Co,* 469 Mich 41, 51-52; 664 NW2d 776 (2003), our Supreme Court reiterated the basic contractual principles that must be observed by courts and which govern contract interpretation:

> This approach, where judges divine the parties' reasonable expectations and then rewrite the contract accordingly, is contrary to the bedrock principle of American contract law that parties are free to contract as they see fit, and the courts are to enforce the agreement as written absent some highly unusual circumstance, such as a contract in violation of law or public policy. This Court has recently discussed, and reinforced, its fidelity to this understanding of contract

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[2] In August 2003, Martin paid plaintiff an additional $5,000 for usage of the area during October 2002.

> law in *Terrien v Zwit,* 467 Mich 56, 71; 648 NW2d 602 (2002). The notion, that free men and women may reach agreements regarding their affairs without government interference and that courts will enforce those agreements, is ancient and irrefutable. It draws strength from common-law roots and can be seen in our fundamental charter, the United States Constitution, where government is forbidden from impairing the contracts of citizens, art I, § 10, cl 1. Our own state constitutions over the years of statehood have similarly echoed this limitation on government power. It is, in short, an unmistakable and ineradicable part of the legal fabric of our society. Few have expressed the force of this venerable axiom better than the late Professor Arthur Corbin, of Yale Law School, who wrote on this topic in his definitive study of contract law, Corbin on Contracts, as follows:
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> > "One does not have 'liberty of contract' unless organized society both forbears and enforces, forbears to penalize him for making his bargain and enforces it for him after it is made. [15 Corbin, Contracts (Interim ed), ch 79, § 1376, p 17.]"

The language of a contract must be construed according to its plain and ordinary meaning, and constrained and technical interpretations are to be avoided. *UAW-GM Human Resource Ctr v KSL Recreation Corp,* 228 Mich App 486, 491-492; 579 NW2d 411 (1998)(citation omitted). A court cannot look to extrinsic testimony to determine intent when the words used in the contract are clear and unambiguous; courts cannot create ambiguity where none exists. *Id.* at 491.

With these principles in mind, we find that the language at issue is not an unenforceable penalty provision as ruled by the trial court. Impermissible penalty fees or provisions arise out of scenarios in which the parties to a contract attempt to include a valid liquidated damages clause. "A contractual provision for liquidated damages is nothing more than an agreement by the parties fixing the amount of damages in the case of a breach of that contract." *Papo v Aglo Restaurants of San Jose, Inc,* 149 Mich App 285, 294; 386 NW2d 177 (1986)(citation omitted); see also *UAW-GM, supra* at 508. "The distinction between a valid liquidated damages clause and an illegal penalty depends on the relationship between the amount stipulated to in the liquidated damages clause and the subject matter of the cause of action." *Papo, supra* at 294, citing *Watson v Harrison,* 324 Mich 16; 36 NW2d 295 (1949); *Malone v Levine,* 240 Mich 222; 215 NW 356 (1927). Courts are to sustain a provision for liquidated damages if the amount is reasonable in relation to the potential injury suffered and not unconscionable or excessive. *UAW-GM, supra* at 508. Parties are not permitted to stipulate unreasonable sums as "damages." *Moore v St Clair Co,* 120 Mich App 335, 340; 328 NW2d 47 (1982). The case law makes clear that unenforceable penalty clauses arise from failed attempts to implement valid clauses for liquidated damages and that clauses for liquidated damages are agreements to fix damage sums should there be a contractual breach.

Here, the provision requiring Martin to pay $1,000 a day to continue using the temporary construction access area beyond May 31, 2002, does not constitute an attempt to provide for liquidated damages because it is not related or tied to a potential breach of contract. The language clearly indicates that the parties were not envisioning that Martin would be in breach of

contract should the work not be completed by May 31, 2002. To the contrary, a plain reading of the agreement reflects that Martin was licensed to use the property beyond May 31 if necessary absent a violation of the agreement. Indeed, the agreement specifically provides that the license obtained by Martin is not terminated until, in part, there has been completion of the construction work. Thus, Martin's continued presence on the property after the scheduled completion date was still under the authority of the license, and any fee amount set in the agreement was necessarily a licensing fee.[3] Kmart had no legal authority under the contract to have Martin enjoined from using the property after May 31 as there was no breach of contract when Martin remained in possession. Rather, the contract simply and unambiguously spells out that if Martin continued using the property after May 31, it would begin paying $1,000 a day for usage instead of the rate of $5,000 a month that was being paid before May 31. Under the unambiguous language of the agreement, the $1,000 a day payment requirement was not a stipulated damage sum in contemplation of a breached contract; no extrinsic evidence to the contrary could be considered. Whether the agreement to pay $1,000 a day constituted a wise business decision is not a question that we are permitted to entertain. The parties were free to contract as they saw fit, and we shall not interfere with their agreement. Furthermore, we decline to extrapolate from the clear contract that the parties' consent to including the provision at issue in the agreement was actually an attempt to disguise what in reality was a penalty clause. We shall not and cannot rewrite this contract.

Defendants did not cross-appeal the trial court's ruling regarding parol evidence, nor do defendants argue on appeal that the court erred, relative to the parol evidence determination, as part of an alternative argument to support the court's ruling with respect to summary disposition. Regardless, we find no error in the court's ruling concerning parol evidence as it related to alleged oral statements made by a Kmart representative *before or contemporaneously with* the execution of the agreement, considering the presence of the integration clause. See *UAW-GM, supra* at 493-502.

In defendants' affirmative defenses, they raised the defense of waiver or subsequent contract modification on the basis that Martin continued making only the $5,000 monthly payment after May 31, 2002, and Kmart continued accepting only the $5,000 payment during the period of possession, without demanding the $1,000 daily fee. Although defendants did not present this argument to the trial court in the face of Kmart's motion for partial summary disposition, the matter had been raised in the pleadings and it became moot, without need for

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[3] The trial court's ruling and defendants' argument that the $1,000 a day provision is not a licensing fee because there is no language supporting such a conclusion is patently incorrect. Paragraph 1 of the agreement, which indicates that a license is being granted and sets forth the $5,000 monthly fee, also provides that "Martin Investment's obligation to pay the License Fee terminates when this Construction License terminates pursuant to Paragraph 4." Paragraph 4 does not provide that the license terminates on May 31, 2001, but may terminate at a later date, and paragraph 4 includes the $1,000 a day provision that kicked in after May 31. Accordingly, by cross reference, the obligation to pay $1,000 a day constituted a continuing licensing fee.

defendants to resort to the argument, in light of the court's ruling that relied on the penalty fee analysis.[4] Under the circumstances of this case and the fact that the hefty sum of $1,000 a day was accumulating after May 31, possibly without any hint that Kmart planned to enforce the provision at issue while it continued accepting the $5,000 monthly payments, we find that the issue of waiver or contract modification is worthy of examination by the court on remand with input and briefing by the parties.[5] On remand, we direct the parties' and trial court's attention to our Supreme Court's decision in *Quality Products & Concepts Co v Nagel Precision, Inc,* 469 Mich 362; 666 NW2d 251 (2003), in which the Court thoroughly examined the principles regarding contract modification or waiver, which can be predicated, though the burden is heavy, solely on a course of conduct even where there exists an anti-waiver clause in the original contract or a clause allowing only written modification. We also note that parol evidence regarding communications *subsequent* to the execution of the agreement can be considered in the context of determining whether there was contract modification or waiver. See *id.* at 373; *Michigan Nat'l Bank of Detroit v Holland-Dozier-Holland Sound Studios,* 73 Mich App 12, 14; 250 NW2d 532 (1976) ("The swath of the parol evidence rule is not so broad as to prevent a showing of subsequent oral modifications."). Of course, if it is determined that material factual issues exist with regard to the matter, a trial would be necessitated. In the absence of waiver or contract modification, judgment must be entered in favor of Kmart consistent with the $1,000 a day contractual provision offset by the $5,000 monthly payments already made by Martin.

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

/s/ Pat M. Donofrio
/s/ William B. Murphy
/s/ Stephen L. Borrello

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[4] We acknowledge that the issue is not presented on appeal.

[5] The question "whether to address an issue not briefed or contested by the parties is left to [the] discretion of the Court," and we find it proper to exercise that discretion under the circumstances presented. *Mack v Detroit,* 467 Mich 186, 207-208; 649 NW2d 47 (2002), citing *Legal Services Corp v Velazquez,* 531 US 533, 549, 558; 121 S Ct 1043; 149 L Ed 2d 63 (2001).