STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT

CH ROYAL OAK, LLC,
Plaintiff/Counter-Defendant,

v. **Case No. 14-143935-CK**
Hon. James M. Alexander

ALIDADE MAIN NORTH, LLC,
Defendant/Counter-Plaintiff.
_____/

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendant/Counter-Plaintiff Alidade Main North's motion for summary disposition brought under MCR 2.116(C)(10). The Court dispenses with oral argument pursuant to MCR 2.119(E)(3).

Defendant admits that it previously filed a motion on this very subject in December 2014. In its March 4, 2015 Opinion on Defendant's prior motion, the Court summarized the issue as follows:

> This dispute centers on the interpretation of the proper accounting of certain expenses for a certain parking garage in Royal Oak.
>
> In 2009-2010, Plaintiff considered buying a vacant lot from Defendant's predecessor in interest – non-party Main Eleven North, LLC in order to build an entertainment venue (theaters, bowling lanes, and a restaurant). But Plaintiff was concerned about the availability of reasonably priced parking.
>
> According to Plaintiff, in induce it to purchase the vacant lot, Main Eleven decided to leverage its underutilized parking garage and surface lot by providing a perpetual easement for parking and a share of parking revenue to Plaintiff as a part of the deal.
>
> To that end, Plaintiff and Main Eleven negotiated three agreements: a Second and Restated Amendment (to a Planned Unit Development); a Parking Management Agreement; and a Declaration of Reciprocal Easement Agreement.

> Main Eleven's interest was subsequently acquired by Bank of America, who sold the same to Defendant in May 2013.
>
> It is important to note that there are two parking areas under the agreements – a parking garage and a surface lot. Plaintiff is responsible for management of the parking garage (owned by Defendant), and Defendant is responsible for managing the surface lot (that it also owns). Defendant argues that the present motion "involves a dispute regarding what constitutes Expenses of the Parking [Garage]." (emphasis in original). Specifically, the parties disagree about how snow plowing expenses are identified and apportioned under the agreements.
>
> Plaintiff claims that it is obligated to pay for 60% the cost of such expenses under the Easement Agreement, subject to certain offsets. Defendant, on the other hand, claims that Plaintiff is obligated to pay 60% of such expenses under the Easement Agreement, **plus** account for the same expenses again to reduce its Management Fee under the Management Agreement.

The Court then examined the agreements and found that "the Easement Agreement must be read in conjunction with the Management Agreement in order to determine the intent of the contracting parties" on the expense issue. The Court then reproduced the apparently conflicting provisions – reasoning and concluding:

> the Court must determine whether costs such as snow removal were meant to be considered "expenses" under the Management Agreement such that Plaintiff was responsible for paying the same as they related to the parking garage.
>
> The Court notes that it is undisputed that that Plaintiff was responsible to pay 60% of these costs for **both** the parking garage and the surface lot under the Easement Agreement. The only issue is whether Plaintiff is also obligated to pay 100% of these costs for the parking garage under the Management Agreement.
>
> As stated, ¶8 of the Management Agreement requires Plaintiff to pay "all Expenses" **of the parking garage**, which are defined as "all ordinary budgeted direct expenses of operating the Parking Facility approved by [Defendant] in the annual operating budget or otherwise in writing" under ¶ 7(b). It appears that snow removal could be included in such a broad definition – although it is not specifically mentioned. But this provision directly conflicts with ¶3.3 of the Easement Agreement, which provides that Plaintiff is responsible to pay 60% of these costs (specifically including snow removal) for **both** the parking garage and the surface lot.

> Based on the foregoing, the Court finds that the contracts contain conflicting provisions with respect to Plaintiff's obligation to pay the disputed costs **for the parking garage**. These conflicting provisions result in multiple interpretations that preclude summary disposition. Because the meaning of these contractual provisions are open to two reasonable interpretations, and the crux of both parties' arguments hinge on the interpretation of their meaning, factual development is necessary to determine the intent of the parties. *Holmes*, 281 Mich App at 594.[1] Specifically, it is unclear whether costs such as snow removal were intended to be included within the definition of expenses under the Management Agreement.

Defendant argues that this issue should be revisited (and the present motion is appropriate) because it has had the opportunity to depose Plaintiff's prior affiants,[2] and they have testified that the agreements are not ambiguous. But there are two problems with this argument.

First, the Court did not consider Plaintiff's affidavits when determining the plain meaning of the Agreements when ruling on Defendant's prior motion. [See Note 1 on Page 7 of the Court's March 4, 2015 Opinion].[3] Second, the existence of ambiguity in a contract is a question of law for the Court to decide. *Farm Bureau Mut Ins Co v Buckallew*, 246 Mich App 607, 612; 633 NW2d 473 (2001). As a result, a lay witness's "legal conclusion" about the existence of ambiguity is irrelevant.

In response, Plaintiff argues that Defendant has distorted or omitted substantive testimony in its motion.[4] This, unfortunately, appears to be the case. Assuming arguendo that it was not, however, it simply means that Defendant has presented more evidence in support of its

---

1 At this point, the Court previously noted:

> On this point, although not considered for determining the plain meaning of the parties' agreements, the Court will note that Plaintiff presented the affidavits of several individuals involved in the negotiating and drafting of the Easement and Management Agreements (including a representative from Defendant's predecessor in interest, Main Eleven) that all indicate that Defendant's proffered interpretation was not the intent of the parties at the time of the agreements. This may prove a tremendous hurdle for Defendant to overcome with the trier-of-fact.

2 The Court did not consider Plaintiff's affidavits when determining the plain meaning of the Agreements when ruling on Defendant's prior motion. [See Note 1 on Page 7 of the March 4, 2015 Opinion].

3 This is so because extrinsic evidence is only admissible if a contract is ambiguous. *Shay v Aldrich*, 487 Mich 648, 667; 790 NW2d 629 (2010). And, in such a case, the intent of the contracting parties becomes a question for the trier-of-fact.

4 Plaintiff also seeks summary disposition under MCR 2.116(I)(2) in its Response.

interpretation (evidence properly considered by the trier of fact). But it doesn't mean that the agreements are unambiguous.

This motion was wholly unnecessary and duplicative of Defendant's prior motion.

For all of the foregoing reasons and considering the evidence in the light most favorable to the nonmovant, the Court finds that there are material questions of fact in dispute that precludes judgment as a matter of law. As a result, both parties' motions for summary disposition are DENIED.

Plaintiff may file an appropriate motion for costs under MCR 2.114 for having to respond to Defendant's frivolous motion.

IT IS SO ORDERED.

June 21, 2016 /s/ James M. Alexander
Date Hon. James M. Alexander, Circuit Court Judge