

**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 regarding proper calculation of expenses. 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.

Defendant now seeks the Court's interpretation of the parties' agreement. To its end, Defendant now moves for summary disposition under MCR 2.116(C)(10), which tests the factual support for Plaintiff's claims. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In response, Plaintiff seeks summary relative to its interpretation under (I)(2).

Both parties rely on written contracts to support their positions. Michigan law is well-established that “a court must construe and apply unambiguous contract provisions as written.” *Rory v Cont'l Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005). Further, “[a] contract must be interpreted according to its plain and ordinary meaning.” *Holmes v Holmes*, 281 Mich App 575, 593; 760 NW2d 300 (2008), citing *St Paul Fire & Marine Ins Co v Ingall*, 228 Mich App 101, 107; 577 NW2d 188 (1998). “Under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court.” *Holmes v Holmes*, supra at 594;

quoting *Meagher v Wayne State Univ*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997).

As often repeated by our Supreme Court, “courts 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.” *Knight Enterprises v Fairlane Car Wash*, 482 Mich 1006; 756 NW2d 88 (2008); quoting *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003).

Under the terms of the August 17, 2010 Easement Agreement, Plaintiff has the right to use both the parking deck and the surface lot. And under the August 18, 2010 Management Agreement, Plaintiff has the right to manage the parking deck (but not the surface lot).

Under the Easement Agreement, in return for its access to parking, Plaintiff is required to reimburse Defendant for 60% of “CAM Costs,” which is defined in the agreement as follows at

¶3.2:

At all times during the term hereof, and at its sole cost and expense (except as set forth herein), [Defendant] shall operate, maintain and replace or cause to be operated, maintained and replaced, all Common Elements located from time to time on Parcel 1 in good order, condition and repair, including compliance with all laws with regard thereto and all requirements of the Americans with Disabilities Act and state and local disable access laws (‘CAM Costs’).

The Easement Agreement continues:

CAM Costs shall include, without limitation, costs incurred with regard to: utilities serving the Parking Garage and Parking Spaces; snow removal; amortized costs of Parking Garage repairs and maintenance, including without limitation, re-paving or resealing; common signage; liability insurance, fire and casualty insurance; sprinkler and life safety systems, if any; the amortized costs of replacement of any structural portion of the Common Elements or Parking Garage; any cost that would normally be classified, pursuant to generally accepted accounting principles, consistently applied, as a capital expense; and the cost of performing any and all other activities as are necessary or required to maintain, repair and replace the Common Elements in good order, condition and repair excluding management fees for the Parking Spaces and costs to repair and maintain the fee collection equipment.

“Common Elements” is defined by the Easement Agreement to include the Parking Garage, the Surface Lot, and all of their related common areas. ¶1(a), (k).

Under the Management Agreement, in return for managing the Parking Garage, Plaintiff is entitled to a “Management Fee” of “the difference between Gross Revenues less Expenses, up to \$100,000.” ¶ 8(b). The Management Agreement defines “Expenses” as “all ordinary budgeted direct expenses of operating the Parking Facility approved by [Defendant] in the annual operating budget or otherwise in writing.” ¶ 7(b). But “[c]osts and expenditures of [Plaintiff] not included within the definition of ‘Expenses’ shall be borne solely by [Plaintiff].” ¶ 7(b)(4)(a).

Under ¶8, the Management Agreement Plaintiff must collect gross revenues and distribute in the following order:

- (a) First, [Plaintiff] shall pay all Expenses, other than the Management Fee, as and when Expenses become due and payable.
- (b) Second, [Plaintiff] shall pay itself an annual management fee of the difference between Gross Revenues less Expenses, up to \$100,000. . . .
- (c) The remainder of the Gross Revenues, if any, after deduction of Expenses and the Management Fee (“Net Revenues”) shall be paid 50% to [Plaintiff] and 50% to [Defendant] on an annual basis. [Plaintiff] shall have the right to offset its portion of the Net Revenues in this Section 8(c) against its share of unpaid CAM Costs (as defined in the [Easement Agreement]). . . .

Under ¶9 of the Management Agreement, Defendant was responsible for operating the surface lot, and “[i]n the event that [Defendant] derives Owner’s Net Revenues from the operation of the Surface Lot, the amount of the Owner’s Net Revenue shall be credited toward [Plaintiff’s] share of unpaid CAM costs.” Further, “[n]otwithstanding the foregoing, Surface Lot Operation Costs shall not include CAM costs which are reimbursed under the [Easement Agreement].” [Management Agreement, at ¶ 9].

The Management Agreement, at ¶26, also contained an integration clause that provides:

This Agreement embodies the entire agreement between the parties hereto with relation to the transaction contemplated hereby, and there have been and are no covenants, agreements, representations, warranties, or restriction between the parties hereto with regard thereto **other than those specifically set forth herein**. This Agreement shall not be amended, modified, or terminated except in writing signed by [Defendant] and [Plaintiff]. (emphasis added).

Further, the Management Agreement, at ¶32, also contained a requirement that the parties execute a certificate that, in relative part, identifies “the documents that comprise this Agreement.” This was apparently completed via a September 8, 2011 Estoppel Certificate and Consent that provided that identified the Second Amended and Restated Development Agreement; the Parking Management Agreement; and the Declaration of Reciprocal Easement Agreement.

Defendant first argues that the integration clause at ¶26 of the Management Agreement (entered a day after the Easement Agreement) bars any consideration of any other agreement (including the Easement Agreement) or writing when determining the intent of the parties.

But in order to accept Defendant’s position that the integration clause was meant to be interpreted without reference to any other agreement, then the Court must first ignore the plain language of the integration clause, which specifically excluded agreements “other than those specifically set forth herein” – and the Management Agreement specifically refers to the Easement Agreement at ¶8(c) and ¶9.

The reverse is also true. The Easement Agreement specifically references the Management Agreement at ¶3.4. These cross-references indicate that the intention of the parties was that these agreements were to be read in conjunction with one another.

Further, were the Court to accept Defendant’s interpretation, ¶32 of the Management

would be rendered “surplusage or nugatory” contrary to Michigan Law. *Knight Enterprises*, 482 Mich 1006; quoting *Klapp*, 468 Mich at 468. This is so because a fully integrated contract would not provide a specific provision calling for the identification of “the documents that comprise this Agreement.”

For these reasons, the Court finds that the Easement Agreement must be read in conjunction with the Management Agreement in order to determine the intent of the contracting parties. This conclusion is consistent with Michigan law. See *West Madison Inv Co v Fileccia*, 58 Mich App 100, 106; 226 NW2d 857 (1975) (reasoning “in order to determine the intention of the parties, separate instruments executed at about the same time, in relation to the same matter and between the same parties and made as elements of one transaction may be examined together and construed as one instrument”); *Culver v Castro*, 126 Mich App 824, 826 338; NW2d 232 (1983) (finding “where there are several agreements relating to the same subject matter the intention of the parties must be gleaned from all the agreements”).

Next, 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.

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.

IT IS SO ORDERED.

March 4, 2015
Date

/s/ James M. Alexander
Hon. James M. Alexander, Circuit Court Judge

¹ 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.