

STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

PRAY FINAL STRAW, LLC,

Plaintiff/Counter-Defendant,

vs.

Case No. 2014-2742-CB

PARTRIDGE CREEK FASHION
PARK, LLC,

Defendant/Cross-Plaintiff.

and

PARTRIDGE CREEK FASHION
PARK, LLC

Third-Party Plaintiff,

vs.

ROBERT C. LEITHAUSER, GWENDOLYN
LEITHAUSER, ROBERT J. PEEBLES, J.D.,
and THOMAS J. LEFEVRE,

Third-Party Defendants.

OPINION AND ORDER

Plaintiff/Counter-Defendant and Third-Party Defendants have filed a joint motion for reconsideration of the Court's November 4, 2015 Opinion and Order.

I. Factual and Procedural History

On August 20, 2013, Plaintiff and Defendant executed a lease for the construction and operation of a restaurant ("Lease"). In addition, Third-Party Defendants each executed guaranties guaranteeing Defendant's obligations under the Lease ("Guaranties").

On July 15, 2014, Plaintiff filed its complaint in this matter. In its complaint, Plaintiff alleges that Defendant has breached multiple provisions of the Lease.

On August 14, 2014, Defendants filed its answer to the complaint, as well as a counterclaim against Plaintiff and a third-party complaint against the Third-Party Defendants. In its counterclaim and third-party complaint, Defendant alleges that Plaintiff has breached the terms of the Lease, and that Third-Party Defendants have breached the terms of the Guaranties.

On June 15, 2015, Plaintiff and Third-Party Defendants filed their joint motion for partial summary disposition. On July 7, 2015, Plaintiff filed its second motion for partial summary disposition. On July 27, 2015, Defendants filed its response to both motions and counter-motion for summary disposition. On August 11, 2015, Plaintiff filed its reply in support of its motion, and its response to Defendant's counter-motion.

On November 4, 2015, the Court issued its Opinion and Order denying Plaintiff's motion for summary disposition, granting Defendant's motion for summary disposition as to its counter and third-party complaint, and leaving the issue of damages open.

On November 9, 2015, Plaintiff and Third-Party Defendants (collectively, "Movants") filed their instant joint motion for reconsideration.

II. Standard of Review

Motions for reconsideration must be filed within 21 days of the challenged decision. MCR 2.119(F)(1). The moving party must demonstrate a palpable

error by which the Court and the parties have been misled and show that a different disposition of the motion must result from correction of the error. MCR 2.119(F)(3). A motion for reconsideration which merely presents the same issue ruled upon by the Court, either expressly or by reasonable implication, will not be granted. *Id.* The purpose of MCR 2.119(F)(3) is to allow a trial court to immediately correct any obvious mistakes it may have made in ruling on a motion, which would otherwise be subject to correction on appeal but at a much greater expense to the parties. *Bers v Bers*, 161 Mich App 457, 462; 411 NW2d 732 (1987). The grant or denial of a motion for reconsideration is a matter within the discretion of the trial court. *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 6-7; 614 NW2d 169 (2000).

III. Arguments and Analysis

In their motion, Movants first contend that Defendant did not trigger the 21 day deadline set forth in Exhibit B-2D when it sent its December 3, 2013 email to Plaintiff's Architect ("Email") because Section V requires that delivery to the architect must be done via ordinary mail. Section V of Exhibit B of the Lease which provides, in part:

All notices, drawing information and other material furnished by [Defendant] to [Plaintiff] under this Exhibit or pursuant to Sections 5.01 or 5.02 of the Lease may be effectively submitted to [Plaintiff] by mailing the same to [Plaintiff] at the address set forth on the Date Sheet on page 1 of the Lease or to Tenant's architect if Tenant has provided [Defendant] with such an address notwithstanding any contrary or additional requirement contained in any other section of the Lease.

(See Plaintiff's Exhibit A.)

A contract must be interpreted according to its plain and ordinary meaning.” *Wells Fargo Bank, NA v. Cherryland Mall Ltd Partnership (On Remand)*, 300 Mich App 361, 386; 835 NW2d 593 (2013), quoting *Holmes v. Holmes*, 281 Mich App 575, 593; 760 NW2d 300 (2008). Under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court. If the contract is subject to two reasonable interpretations, factual development is necessary to determine the intent of the parties and summary disposition is therefore inappropriate. If the contract, although inartfully worded or clumsily arranged, fairly admits of but one interpretation, it is not ambiguous. *Klein v. HP Pelzer Auto Sys, Inc*, 306 Mich App 67, 75–76; 854 NW2d 521 (2014).

In this case, Section V provides that notice “may” be delivered by “mailing” the Approved Store Design Drawings to Plaintiff’s architect. (See Plaintiff’s Exhibit A.) The provision clearly provides that mailing via ordinary mail is a permissible manner of delivery. It does not provide, however, that ordinary mail is the only manner of acceptable service. Indeed, while the parties utilize more restrictive terminology such as “shall be” multiple times in Section V to restrict the parties’ performance, they elected to use permissible rather than mandatory language when they chose to state that delivery may be made by mailing. The use of such language indicates that while mailing was a way in which to effectuate delivery, it was not the sole or exclusive manner. It is undisputed that Plaintiff’s architect received the Approved Store Design Drawings. Moreover, it is undisputed that despite receiving the approved drawings, Plaintiff failed to submit

its drawings within 21 days of delivery of the Email, or at any time thereafter. For these reasons, the Court remains convinced that the Email triggered the 21 day deadline and that Plaintiff failed to submit its drawings as required by the Lease.

Movants also contend that the approval of the store drawings was not a “notice, drawing or other material” furnished to Plaintiff within the meaning of Section V. Specifically, Movants assert that the approved store drawings were not a notice merely because the Lease does not use the word notice when discussed the documents. However, even if the approved store drawings did not constitute a notice, Movants’ argument is meritless because the items in question are Approved Store Design Drawings, and drawings are another category of items that are covered by Section V. Consequently, the Court is satisfied that Movants’ position is without merit.

Finally, Movants contend that Plaintiff has not incurred any damages for unpaid rent as the obligation to pay rent never started. However, the Court has already held that the issue of damages remains in dispute and therefore open. Accordingly, the Court need not reconsider whether Defendant is entitled to recover rent as the Court has not made any determination on this issue and has left Defendant with its burden of establishing its entitlement.

IV. Conclusion

Based upon the reasons set forth above, Movants’ motion for reconsideration of the Court’s November 4, 2015 Opinion and Order is DENIED. The issue of damages remains OPEN. In compliance with MCR 2.602(A)(3), the

Court states this Opinion and Order neither resolves the last claim nor closes the case.

IT IS SO ORDERED.

Date: FEB 12 2016

Kathryn A. Viviano
Hon. Kathryn A. Viviano, Circuit Court Judge