

STATE OF MICHIGAN
IN THE 20TH CIRCUIT COURT FOR THE COUNTY OF OTTAWA

414 Washington Street
Grand Haven, Michigan 49417
(616) 846-8320

DENNIS FOLEY,
Plaintiff,

v

JSJ FURNITURE CORPORATION, d/b/a
IZZYDESIGN,
Defendant.

OPINION AND ORDER

File No. 14-3599-CK
Hon. Jon A. Van Allsburg

At a session of said Court held in the Ottawa County
Courthouse in Grand Haven, Michigan on May 22, 2014

PRESENT: HON. JON A. VAN ALLSBURG, CIRCUIT JUDGE

Plaintiff Dennis Foley brings a motion for partial¹ summary disposition pursuant to MCR 2.116(C)(10). Plaintiff contends that there is no genuine dispute regarding the meaning of the royalty provision of the parties' commercial agreement. However, this Court finds that there is such a dispute. Therefore, plaintiff's motion must be denied.

Plaintiff Dennis Foley (Foley) designs furniture. Defendant JSJ Furniture Corporation, d/b/a Izzydesign (Izzydesign) builds and sells furniture. Foley and Izzydesign entered into an agreement pursuant to which Foley agreed to design a chair and Izzydesign agreed to build and sell the chair. The parties agreed that Foley would be compensated for his services with royalties paid from the revenue generated by the sale of the chair. The contract between the parties, dated

¹ Plaintiff's complaint is pled in two counts: count I, breach of contract, and count II, conversion. Plaintiff's motion pertains solely to count I.



March 1, 2001, requires Izzy to pay Foley a royalty for each product sold by Izzy. Paragraph 4.2. Royalties are to be paid within thirty (30) days following the end of a calendar quarter. Paragraph 4.4. The royalty provision of the parties' agreement is found in "Product Design Schedule No. 1," signed by the parties on April 2, 2001 and attached to the contract, and provides:

Royalty amounts shall be calculated based on the cumulative Revenue or Sublicense Royalty, as applicable, for each calendar year as set forth below:

<u>Royalty %</u>	<u>Revenue</u>
2.5%	first \$0-10mm
1.5%	next \$10-30mm
0.75%	next \$30mm +

The parties disagree as to how this provision should be construed. Foley maintains that the prepositional phrase "for each calendar year" modifies the closest referent noun, "cumulative revenue" (or more precisely, the grouped nouns "cumulative Revenue or Sublicense Royalty," although the dispute in this case is over the application of the term "cumulative revenue"). Foley contends that to calculate the royalties to which he is entitled, the amount of revenue is re-set to \$0 at the beginning of each calendar year and the royalty percentage is selected by determining the amount of revenue generated by the sale of the chair in the preceding year.

Izzydesign disagrees. Izzydesign maintains that "for each calendar year" modifies "royalty amounts." Izzydesign contends that at the beginning of each calendar year, the cumulative revenue generated by the sale of the chair – i.e., the revenue generated from the date of execution of the parties' agreement to the present – is calculated and the royalty percentage for the year is determined based on cumulative revenue.

When a motion for summary disposition is brought pursuant to MCR 2.116(C)(10), the moving party must submit affidavits or other documentary evidence in support of the motion. MCR 2.116(G)(3)(b). If the motion is properly made and supported, the adverse party may not rest on mere allegations or denials, but must, by affidavits or otherwise, set forth specific facts showing that there is a genuine issue for trial. MCR 2.116(G)(4).

“The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties.” *Grosse Pointe Park v Michigan Municipal Liability and Property Pool*, 473 Mich 188, 197; 702 NW2d 106 (2005) (quoting from *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566; 489 NW2d 431 (1992)). “To this rule all others are subordinate.” *Grosse Pointe Park, supra*, quoting from *McIntosh v Groomes*, 227 Mich 215, 218; 198 NW 954 (1924). “[D]ue regard must be had to the purpose sought to be accomplished by the parties as indicated by the language used, read in the light of the attendant facts and circumstances.” *Grosse Pointe Park, supra*, pp 200-201, quoting from *W O Barnes Co, Inc v Folsinski*, 337 Mich 370, 376-377; 60 NW2d 302 (1953). “Such intent when ascertained must, if possible, be given effect and *must prevail as against the literal meaning* of expressions used in the agreement.” *Grosse Pointe Park, supra*, p 201, quoting from *W O Barnes, supra* (emphasis added).

Contractual language may be clear and unambiguous. If so, the contract “... is to be construed according to its plain sense and meaning.” *Grosse Pointe Park, supra*, p 198, quoting from *New Amsterdam Cas Co v Sokowlowski*, 374 Mich 340, 342; 132 NW2d 66 (1965). However, if the language of the contract is ambiguous, “... testimony may be taken to explain the ambiguity.” *Grosse Pointe Park, supra*, quoting from *New Amsterdam, supra*.

In written contracts, there are two types of ambiguity: patent and latent. *Grosse Pointe Park, supra*, p 198. A patent ambiguity is one “that clearly appears on the face of a document, arising from the language itself.” *Grosse Pointe Park, supra*, quoting Black’s Law Dictionary (7th ed). A latent ambiguity is one “that does not readily appear in the language of a document, but instead arises from a collateral matter when the document’s terms are applied or executed.” *Grosse Pointe Park, supra*, quoting Black’s Law Dictionary (7th ed).

A latent ambiguity is “latent” because it “... does not develop until we seek to apply it and then discover the equivocation.” Black’s Law Dictionary (7th ed).² While it is not necessary to use extrinsic evidence to detect a patent ambiguity, extrinsic evidence must be used to detect a latent ambiguity because “the detection of a latent ambiguity requires a consideration of factors outside the instrument itself.” *Grosse Pointe Park, supra*, p 198, quoting from *McCarty v Mercury Metalcraft Co*, 372 Mich 567, 575; 127 NW2d 340 (1964). Therefore, extrinsic evidence is admissible “... to prove the existence of the ambiguity, as well as to resolve any ambiguity proven to exist.” *Grosse Pointe Park, supra*, quoting from *McCarty, supra*. “Where a latent ambiguity exists in a contract, extrinsic evidence is admissible to indicate the actual intent of the parties as an aid to the construction of the contract.” *Grosse Point Park, supra*, quoting *McCarty, supra*. See also *Shay v Aldrich*, 487 Mich 648, 667-668; 790 NW2d 629 (2010).

This Court holds that the royalty provision is not patently ambiguous. Applying the syntactic canon of construction known as the Nearest-Reasonable-Referent Canon³, this Court

² Quoting Wigmore, *A Student’s Textbook of the Law of Evidence* 529 (1935). A latent ambiguity “arises not upon the words of the ... instrument, as looked at in themselves, but upon those words when applied to the object or to the subject which they describe.” *Hall v Equitable Life Assurance Society of the United States*, 295 Mich 404, 409; 295 NW 204 (1940).

³ “When the syntax involves something other than a parallel series of nouns and verbs, a prepositive or postpositive modifier normally applies only to the nearest reasonable referent.” Scalia and Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: West, 2012), p 152.

concludes that because the prepositional phrase “for each calendar year” is located closer to the referent noun “cumulative revenue” than it is to the referent noun “royalty amounts,” the phrase “for each calendar year” modifies “cumulative revenue” rather than “royalty amounts.”

We next turn to whether or not the royalty provision contains a latent ambiguity.

Izzydesign has submitted the affidavit of Chuck Saylor. Saylor was the president of Izzydesign at the time that the parties entered into their agreement. Saylor affidavit, paragraph 1. He was one of the executives at Izzydesign who was responsible for negotiating the terms of the agreement. Saylor affidavit, paragraph 2. During these negotiations, Saylor and Foley discussed the royalty provision. Saylor affidavit, *supra*. The interpretation of the royalty provision now advocated by Foley was not discussed by Foley and the representatives of Izzydesign during the negotiations that resulted in the parties’ agreement. Saylor affidavit, paragraphs 3 & 5. The interpretation of the royalty provision advocated by Foley is not the interpretation that was intended by the parties at the time that they negotiated the agreement. Saylor affidavit, *supra*. It was Saylor’s intention that “for each calendar year” modify “royalty amounts” rather than “cumulative revenue. Saylor affidavit, paragraph 8. Saylor said the intent of this was to pay “front end loaded royalties” to the designer in order to repay investment and effort, and reduce royalties later as the total “approached moving beyond what would be considered fair compensation.” Saylor affidavit, paragraph 5.

Izzydesign has also submitted the affidavit of Nelson Jacobson. Jacobson was the leader of JSJ’s furniture business at the time that the parties negotiated their agreement. Jacobson affidavit, paragraph 1. Foley and the representatives of Izzydesign who negotiated the agreement intended that the tiered royalty structure set forth in the royalty provision would be

based on cumulative revenue over the life of the product and would not be re-set at \$0 every year. Jacobson affidavit, paragraphs 3 & 5. He said the intent of this arrangement was to provide fair compensation to the designer, but to reduce royalties over the years “as we move beyond the point at which the designer has received fair compensation.” Jacobson affidavit, paragraph 4.

Foley has not submitted an affidavit in support of his motion and relies solely on the language of the royalty provision itself. Foley testified at his deposition that he has no recollection of the negotiations that resulted in the parties’ agreement.

Based on the affidavits of Saylor and Jacobson⁴, this Court finds that the royalty provision of the parties’ agreement contains a latent ambiguity. This finding sets up a conflict in the law of contract, given clear expression by the Michigan Supreme Court in the case of *Shay v Aldrich*, 487 Mich 648, 790 NW2d 629 (2010), which applied the doctrine of latent ambiguity.

In the dissenting opinion of Justice Markman, the conflict is described as follows:

“Because the latent-ambiguity doctrine permits the admission of extrinsic evidence *before* an ambiguity is found to exist, it is in tension with the fundamental rule of contracts that when a contract is clear and unambiguous on its face, a court will not consult extrinsic evidence and will enforce the contract as written. See, e.g., *Farm Bureau*, 460 Mich at 566, 596 NW2d 915. This Court in *Mich. Chandelier Co. v Morse*, 297 Mich 41, 48, 297 NW 64 (1941), addressed this tension and provided its proper resolution by making clear that “[a]n omission or mistake is not an ambiguity. Parol evidence under the guise of a claimed latent ambiguity is not permissible to vary, add to or contradict the plainly expressed

⁴ In their affidavits, Saylor and Jacobson describe in detail certain economic factors in the furniture industry which, if true, cast doubt on the plausibility of Foley’s interpretation of the royalty provision. While this testimony is not directly relevant to the specific issue as to which plaintiff believes that there is no genuine dispute, i.e., the parties’ intentions at the time that they entered into the agreement, this testimony does bolster affiants’ credibility, particularly since Foley does not challenge the accuracy of affiants’ description of these economic factors. Foley’s silence on this issue is curious in light of his assertion in his brief that he “spent approximately 12 years at Herman Miller negotiating these contracts on the other side of the negotiating table.”

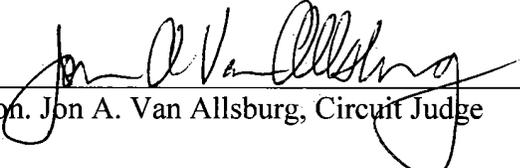
terms of this writing or to substitute a different contract for it to show an intention or purpose not therein expressed.”

Similarly, this Court in *Hall*, in finding a latent ambiguity, explained that “[a]n ambiguity is properly latent, in the sense of the law, when the ... extrinsic circumstances to which the words of the instrument refer [are] susceptible of explanation by a mere development of extraneous facts *without altering or adding to the written language...*” *Hall*, 295 Mich at 409, 295 NW 204 (citation omitted) (emphasis added). Under this proper understanding of the latent-ambiguity doctrine, a court does not “cross the point at which the written contract is *altered* under the guise of contract *interpretation*.” *Grosse Pointe Park*, 473 Mich at 218, 702 NW2d 106 (opinion by YOUNG, J.). And importantly, pursuant to this understanding, the doctrine's exception, by which extrinsic evidence is permitted to ascertain intent *before* an ambiguity has been found to exist, does not nullify the most basic and fundamental rule of contract law—that unambiguous contracts are not open to judicial construction and must be enforced as written.” *Id.*, at 679-680 (emphasis in original).

The Court finds that there is a genuine factual dispute for trial as to whether “for each calendar year” modifies “cumulative revenue” or “royalty amounts.” For this reason, plaintiff’s motion for partial summary disposition must be, and is, DENIED.

IT IS SO ORDERED.

Dated: May 22, 2014



Hon. Jon A. Van Allsburg, Circuit Judge