STATE OF MICHIGAN

IN THE SUPREME COURT

MAJESTIC GOLF, LLC, a Michigan limited liability company,

Plaintiff/Counter-Defendant/Appellee,

v

LAKE WALDEN COUNTRY CLUB, INC., a Michigan Corporation,

Defendant/Counter-Plaintiff/Appellant.
_____________________________________/

Supreme Court No. 145988

Court of Appeals No. 300140

Livingston County Circuit Court No. 09-24146-CZ

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LAKE WALDEN COUNTRY CLUB, INC.'S REPLY BRIEF ON APPEAL

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INTRODUCTION

With the extensive briefing, this matter can look very complicated. We respectfully suggest that it need not be. This case turns, quite simply, on whether Lake Walden County Club ("LWCC") was in default of its Lease for failing to sign the "consent to grant of easements" that Majestic Golf, LLC ("Majestic") tendered. If LWCC was not in default, summary disposition should be granted for LWCC. If any question of fact remains as to **whether** LWCC was in default, Majestic's motion for summary disposition should be denied, and the matter remanded for trial.

Two of the arguments in our brief on appeal ("LWCC's Brief") require summary disposition for LWCC. First, the tenant's obligation under Paragraph 22 of the Lease was, as relevant, to permit the landlord to develop "drainage and utility easements" and "road crossings." The landlord in his letter of October 7, 2008 demanded that LWCC sign a consent to a road crossing easement, yet Paragraph 22 mentions neither a "consent" nor a "road crossing easement". The landlord has no right to demand more concessions than the tenant agreed to in the Lease, and if the tenant fails to comply it is not in violation.

Second, Paragraph 26(D) requires the landlord to give the tenant 30 days' notice of failure to perform, which affords the tenant an opportunity to cure. Paragraph 31 provides that the landlord must give notice by "registered mail, postage prepaid, return receipt requested." If Majestic did not give notice that way, LWCC could not be in default. LWCC sought summary disposition under MCR 2.116(C)(10) – no disputed issue of fact – and backed it by Mr. Henderson's affidavit saying "Neither I nor any shareholder or representative of LWCC received a notice from Majestic that specifically declared a default as required by paragraph 26 of the Lease." To counter this successfully, Majestic had to submit an affidavit or documentary evidence (the receipt) showing that it did mail the notice that way. Majestic did neither, but

rather submitted a vague and evasive affidavit that said that it gave notice "consistent with the notice provisions in the Lease." This doesn't create a disputed issue of fact because it does not establish the precise way of mailing. Accordingly, LWCC was not in default and Majestic's complaint should be dismissed.

Two other grounds for why LWCC is not in default (the letter is unclear as to whether it is declaring a default, and the notice was waived or withdrawn by the landlord's conduct) involve disputed issues of fact, which require resolution at trial. In no event can the landlord prevail by motion on these issues as the facts currently stand.

ARGUMENT

I. SUMMARY DISPOSITION SHOULD BE GRANTED FOR LWCC.

When **all** provisions of the Lease are construed by their unambiguous terms, as required by *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 52, 62–63; 664 NW2d 776 (2003) and *Rory v Continental Ins Co*, 473 Mich 457, 470; 703 NW2d 23 (2005), LWCC was not in default, and summary disposition should be entered for LWCC. The Lease did not obligate LWCC to sign Majestic's proffered "consent" to a "road crossing easement", and Majestic did not properly put LWCC on notice of an impending default in the manner the Lease required.

A. Paragraph 22 of the Lease Does Not Obligate LWCC to Sign the Proffered Consent to Easement.

Although Majestic concedes that the Lease must be construed strictly according to its terms, Majestic persistently misstates what Paragraph 22 of the Lease actually requires. What Paragraph 22 says is that LWCC "shall permit **drainage and utility easements** and **road crossings** to be developed by landlord," subject to certain requirements. (Apx 68a, emphasis added). By its express terms, Paragraph 22 refers to "drainage and utility easements" and "road crossings." Paragraph 22 does **not** refer to "easements for road crossings," or "road crossing

easements," or a "consent" to a road crossing easement.[1] Thus, LWCC could not have been in default when it failed to sign because nothing in the Lease obligated it to sign Majestic's proffered "consent" to a "road crossing easement".[2]

Accordingly, LWCC was entitled to summary disposition. The Court of Appeals failed to apply the principles of *Wilkie* and *Rory* when it held that **Majestic** was entitled to summary disposition under MCR 2.116(C)(10) because LWCC failed to sign the proposed consent to a "road crossing easement" within 30 days of Mr. Crouse's October 7, 2008 letter.

B. Majestic Failed to Give LWCC Notice of an Impending Default by Registered Mail, Return Receipt Requested.

Paragraph 26(D) of the Lease, in relevant part, provides that a default shall exist "[i]f Tenant shall fail to perform any of the agreements, terms covenants or conditions" (other than payment of rent), and the non-performance continues for 30 days after the Landlord gives "notice thereof". (Apx 70a). Paragraph 31(A) provides that any notice by Landlord shall be given "by registered mail, postage prepaid, return receipt requested".[3] (Apx 74a).

Mr. Henderson's affidavit saying "Neither I nor any shareholder or representative of LWCC received a notice from Majestic that specifically declared a default as required by paragraph 26 of the Lease" (Apx 98a) was sufficient to require summary disposition for LWCC.

[1] Majestic calls this argument "ultra-technical," Majestic's Brief, p. 30, which is ironic given how Majestic used technicalities to attempt to trap LWCC into forfeiting its $6,000,000 investment in the Golf Course.

[2] LWCC also showed the Court that Majestic's proposed "road crossing easement" (Apx 183a) does not reveal the size, design, specifications or grade of the proposed roadway or utilities, which would be necessary to allow LWCC to determine whether the "utilities and roads shall be installed in such a manner as to ensure that the integrity of the golf course is preserved, leaving the golf course in equal or better condition," LWCC's Brief, pp. 35-36, quoting the final sentence of Paragraph 22 of the Lease (Apx 68a). Majestic responds that Paragraph 22 "does not include any language requiring that the size, design, specifications or grade of a desired roadway be specified in an easement agreement pursuant to that provision . . .." Majestic's Brief, pp. 31-32. That is because Paragraph 22 fails to mention a "road crossing easement" at all.

[3] Contrary to Majestic's assertion, LWCC preserved this argument for appellate review: The Court of Appeals addresses this argument (albeit incorrectly) in its opinion. COA Opinion p. 14 (Apx. 32a).

Where a party moves for summary disposition under MCR 2.116(C)(10), the opposing party, by affidavits or documentary evidence, must "set forth specific facts showing that there is a genuine issue for trial." MCR 2.116(G)(4). "If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted." *Smith v. Globe Life Ins Co,* 460 Mich 446, 455; 597 NW2d 28 (1999). Thus, to counter LWC's motion successfully, Majestic had to show specifically that it did mail the notice by registered mail, return receipt requested. Majestic did not submit the registered mail receipt. Mr. Crouse's vague and evasive affidavit does not state how he mailed the letter, but only that "On October 8, 2008, I mailed to LWCC, consistent with the notice provisions contained in the Lease, a letter dated October 7, 2008." (Apx 108a). Nor does Mr. Crouse's letter (Apx 175a) state how it was mailed, although Majestic or its attorneys certainly knew how to do this: The November 24, 2008 notice from Majestic's attorney (which looks like it came from the same word processor) specifically states that it was sent "***By Registered Mail.***" (Apx 165a, bold and italics in original). The Court of Appeals acknowledges that Mr. Crouse's "letter does not identify either way how it was mailed," and that Mr. Crouse does not state the manner of mailing in his affidavit. (Apx 32a). This alone means that LWCC's motion for summary disposition should be granted, and Majestic's cross-motion for summary disposition should be denied.

LWCC had a right to receive the notice it bargained for, as provided by the unambiguous terms of the Lease. See *DeFrain v State Farm Mut Auto Ins Co,* 491 Mich 359; 817 NW2d 504 (2012). The method of notice mandated by the Lease was important not only to ensure that LWCC actually received the notice, but also because registered mail, return receipt requested would be a "red flag" signifying that Majestic wasn't just responding to the latest back-and-forth in the merger negotiations, but was instead embarking on a different process entirely – seeking forfeiture of LWCC's entire interest in the Golf Course. Majestic, not LWCC, had the burden of

showing, by competent evidence, the existence of facts sufficient to support its claim that it sent the letter by registered mail, return receipt requested, and therefore had a right to terminate the lease and impose a forfeiture on LWCC. It is well established that contractual requirements for forfeiture must be strictly enforced. See cases cited in LWCC's Brief, pp. 17-18.

Revealingly, Majestic responds by asserting that it is prepared on remand to present admissible testimony and documentary evidence on the manner of mailing. Majestic's Brief, p. 35. This assertion, of course, does not excuse Majestic's failure to proffer such evidence at the summary disposition stage.

II. GENUINE ISSUES OF FACT REMAIN THAT PRECLUDE SUMMARY DISPOSITION FOR MAJESTIC.

In addition and in the alternative, genuine issues of fact remain that preclude summary disposition for Majestic, and the Court of Appeals disregarded *Wilkie* and *Rory* when it held the contrary.

A. Genuine Issues of Material Fact Remain as to Whether Majestic's October 7, 2008 Letter Was Substantively Sufficient to Put LWCC on Notice of an Impending Default and its Obligation to Cure.

There is a genuine issue of a material fact as to whether Mr. Crouse's October 7, 2008 letter, particularly when viewed in the context of other communications between the parties, adequately put LWCC on notice of an impending default and its opportunity to cure within 30 days as required by Paragraph 26(D) of the Lease (Apx 70a).

On its face, Mr. Crouse's October 7, 2008 letter was at best ambiguous. The letter asserts that Paragraph 22 of the Lease "obligates Lake Walden to permit road crossing easements when required by Waldenwoods." (Apx 175a) Yet, as discussed in Part IA above, this misstates the obligation of Paragraph 22, which is not to permit road crossing easements (or to sign consent documents) but to permit landlord to develop "drainage and utility easements" and "road crossings" (not road crossing easements). Can a letter that mischaracterizes the obligation be

held to be a valid demand? If so, why? Doesn't the fact finder get to decide if this was the required notice?

Noteworthy also is that not once does the letter refer to "default," "breach," "termination," or "forfeiture," to say nothing of the draconian consequences facing LWCC. Again, these failures should be for the fact finder to weigh and evaluate, not a court on a motion for summary disposition. The occurrence of a default or breach of contract presents a question of fact. *Detroit v Porath*, 271 Mich 42, 54-55; 260 NW 114 (1935). Thus, the trier of fact must decide whether the ambiguous, bland and misleading language of Mr. Crouse's letter was sufficient to satisfy the requirements of Paragraph 26(D), and put LWCC on notice that it faced default, forfeiture of its $6,000,000 investment and destruction of its business if it failed to sign and return the "consent" within 30 days. Indeed, the trier of fact could find that the letter was actually intended to "set up" LWCC for the termination notice that followed.

Majestic contends that LWCC is asking this Court to "read additional requirements into the language" of Paragraph 26(D). Majestic's Brief p. 25. It is true Paragraph 26(D) does not specify the form or substance of notice that must be given to invoke a forfeiture – one way or the other. Paragraph 26(D) says only that Landlord must give Tenant "notice" of tenant's "fail[ure] to perform any of the agreements, terms, covenants, or conditions" of the Lease. Thus, Paragraph 26(B) is **ambiguous** as to the form of notice required, and its meaning and interpretation is a question of fact for the trier of fact. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 480; 663 NW2d 447 (2003). According to the Court of Appeals, since the Lease fails to specify what form of notice is required, any words will do. Surely, however, the words that are used must cause a reasonable person to understand that a default has been triggered. There is a disputed issue of fact as to whether the words of Mr. Crouse's letter would inform the recipient that default and forfeiture have been put in play. The trier of fact could conclude that

the October 7, 2008 letter, which blandly asks LWCC to "Please sign and return the enclosed Consent within 30 days" is ambiguous and insufficient to trigger a default. Both the requirements of the Lease and the adequacy of the notice are thus questions of fact that must be decided by the trier of fact in light of all the circumstances.

B. Genuine Issues of Fact Remain as to Whether Majestic Waived or Withdrew any Requirement that LWCC Sign the Consent to Easement Until the Conclusion of the Merger Negotiations.

Even if Mr. Crouse's October 7, 2008 letter might have been sufficient had it been the only communication between the parties, the fact is that it came in a blizzard of contradictory communications from Majestic that indicate it did not expect LWCC to formally consent to the road easement until the merger between the parties was either consummated or abandoned. Accordingly, even if Paragraph 22 of the Lease obligated LWCC to sign the proffered consent,[4] and even if Mr. Crouse's October 7th letter standing alone would constitute a demand under Paragraph 26(D), Majestic's subsequent conduct rendered the letter ambiguous, waived the right to claim a default, and estopped Majestic from doing so.[5] This is a disputed issue of fact, and only the trier of fact can decide it – not a judge hearing motions, and certainly not the Court of Appeals. *Detroit v Porath*, supra, 271 Mich at 54-55.

The factual context is critically important, and must be evaluated by the trier of fact. Mr.

[4] Not only does Paragraph 22 fail to mention a "consent" or a "road crossing easement," see Part IA above, but it fails to include any specific standards for the proposed improvements. See p. 2 n. 3 above. The trier of fact thus could conclude that Paragraph 22 is unenforceable for indefiniteness. See *Opdyke Investment Co v Norris Grain Co*, 413 Mich 354, 359, 360; 320 NW2d 836 (1982) (holding that "a contract to make a contract can fail for indefiniteness if the trier of fact finds that it does not contain an essential term," and that "[w]hether the parties intend to be bound only by a formally written and executed final document is a question of fact, not a question of law; in most cases the question is properly left to the jury.").

[5] As the Court of Appeals recognized, traditional contract defenses remain fully available under this Court's opinions in *Rory* and *Wilkie*, including waiver and estoppel. COA Opinion, p. 12 (Apx 30a). Majestic's conduct fits squarely into the elements of waiver and estoppel. See LWCC's Brief, pp. 32-33. The existence of waiver and estoppel are questions of fact. See, *e.g.*, *Cobbs v. Fire Ass'n of Philadelphia*, 68 Mich 465, 465-66; 36 NW 788 (1888) (waiver); *Anderson v Sanders*, 14 Mich App 58, 61; 165 NW2d 290 (1968) (estoppel).

Crouse's letter of October 27, 2006 (Apx 56b-57b), and all drafts of the merger documents by both parties, starting with the very first draft in December 2007 – referred to the easement agreement as an exhibit to the merger documents. See LWCC's Brief, pp. 8-11, 29-30. On October 8, 2008, the day after Mr. Crouse's October 7 letter, Mr. Crouse acknowledged that he did not expect LWCC to sign the consent unless "agreement cannot be reached" on the proposed merger. See Oct. 8, 2008 e-mail, p. 1 (Apx 173a). And on October 13, 2008, Mr. Crouse sent LWCC a long letter in which he discussed "problems" with the parties' merger negotiations, but made no mention of the consent or easement agreement. (See Apx 168a). Thus, even if the October 7, 2008 letter, standing alone, might not have been ambiguous, the trier of fact could conclude that the factual context rendered it ambiguous and ineffective as the notice required by the lease, and withdrawn. Genuine issues of material fact remained and the Court of Appeals erred when it held Majestic was entitled to summary disposition.[6]

C. Majestic's Speculation About LWCC's Motives Simply Raises Questions of Fact that Must Be Resolved at Trial

Majestic devotes nearly half of its Brief to a lengthy and argumentative statement of facts, then repeats the same assertions throughout its legal argument. Majestic speculates that LWCC was engaged in some nefarious plot to "thwart" the efforts of Majestic's affiliate, Waldenwoods Properties, LLC ("Waldenwoods") to develop its land surrounding the Golf Course for residential use. Majestic's Brief pp. 9-10, 40. Majestic's speculation played no role in the decisions of either the trial court or the Court of Appeals. Moreover, Majestic's speculation is illogical. Both parties always anticipated that the land surrounding the Golf

[6] Further, even assuming Mr. Crouse's letter was adequate notice to LWCC, the trier of fact could conclude that the final clause of Paragraph 26(D) precludes a default. That clause provides that if performance "cannot be reasonably had" within 30 days, Tenant is not in default if it "in good faith commence[s] such performance within such thirty (30) day period . . .." The parties had been negotiating the terms of the road crossing easement (along with the other terms of the merger) for more than a year, and those negotiations continued beyond that 30-day period. See note 7, below.

Course would be developed for single-family homes. This was part of the original plan prepared by golf course architect Jerry Matthews in 1991, see F. Crouse ltr. Oct. 13, 2008 (Apx 170a), and development of the homes would increase the number of golfers and the revenues of the Golf Course. See Henderson Aff. Oct. 7, 2009, ¶¶ 18-19 (Apx 98a). The parties had previously agreed on many other easements, see LWCC's Brief, p. 4, and Majestic fails to suggest that LWCC would benefit in any way by thwarting Majestic's development plans.

Majestic repeatedly asserts that LWCC unilaterally sought to "link" the easement to the merger negotiations. See Majestic's Brief pp. 14, 15, 16, 26, 27, 39, 40. **Majestic** made the road crossing easement part of the merger negotiations in its October 27, 2006 letter (Apx 56b-57b) , and in the February 12, 2008 draft pre-organization agreement drafted by Majestic's attorney (Apx 189a, 195a); that "linkage" was part of the understanding between the parties from the outset. See LWCC's Brief, pp. 8-11, 29-30. Likewise, Majestic's repeated assertion that LWCC's December 11, 2008 redraft of the road easement was "take it or leave it", which LWCC said it would not negotiate, Majestic's Brief pp. 19, 27, finds no support in the letter from LWCC's counsel's forwarding that draft (Apx 148a) or any other document. Instead, Majestic's lengthy delays in drafting documents and responding to LWCC during the 2006-2008 negotiations,[7] the fact that Majestic's counsel never reached out to LWCC's counsel before declaring a default, and Majestic's complete failure to respond to LWCC's December 11, 2008 letter, all contradict Majestic's assertion that it had any "critical" need for the consent to be

[7] Majestic first mentioned a road crossing easement in its letter of October 27, 2006 (Apx 56b-59b). Majestic, however, did not send LWCC a draft of the easement and consent until **six months** later, on April 26, 2007 (Apx 60b-70b). The parties met and discussed changes to the easement on June 1, 2007 (Apx 85b). Majestic then waited **five months**, until November 5, 2007, to forward LWCC a revised draft of the easement and consent (Apx 92b-102b). LWCC's counsel delivered the initial draft of the merger documents to Majestic in December 2007 (Apx 103b-116b). Majestic responded **two months** later, forwarding LWCC a revised pre-organization agreement on February 12, 2008 (Apx 189a). Both drafts listed the road crossing easement as an exhibit to be executed on closing of the merger (see Apx 113b, 116b, 195a).

signed before the merger documents. See Majestic's Brief, p. 6.

Most importantly for this appeal, Majestic's factual assertions simply represent issues of fact that must be resolved at trial, where the trier of fact can evaluate the conduct and motives of **both** parties.

III. IN THE ALTERNATIVE, THIS COURT SHOULD HOLD THAT A LANDLORD MAY TERMINATE A LEASE OF REAL PROPERTY ONLY WHERE THE TENANT'S DEFAULT IS MATERIAL.

As the steward of the common law, it is certainly within this Court's power to adopt a rule balancing contract and real property interests. LWCC relies on its Brief on Appeal and the briefs of amici for this alternative argument.

CONCLUSION AND RELIEF

For the reasons set forth in its Application for Leave to Appeal and this reply brief, Lake Walden Country Club, Inc., respectfully requests that this Court reverse the decision of the Court of Appeals and remand to the trial court for entry of a judgment for LWCC, or in the alternative for a trial on the remaining issues of material fact. In the further alternative, if this Court wishes to narrow the scope of *Wilkie v. Auto-Owners Ins. Co.,* 469 Mich 41; 664 NW2d 776 (2003) and *Rory v Continental Ins Co,* 473 Mich 457; 703 NW2d 23 (2005), this Court should hold that as a matter of public policy, a landlord may not terminate a lease of real property for a default that is not material.

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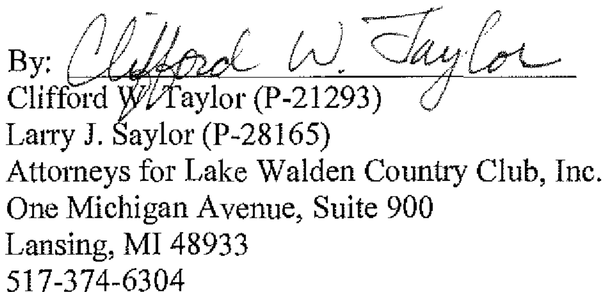

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