RECEIVED by MSC 12/1/2017 2:51:32 PM

STATE OF MICHIGAN
IN THE SUPREME COURT

DONNA WALKER, WILLIAM WALKER and HEAD TO TOES MASSAGE THERAPY OF OXFORD, INC.,

Plaintiffs/Appellees,

MI Supreme Court Case No. 156651
Lower Ct: Oakland County Circuit
LC No. 2015-145545-CK
COA No. 332129

v.

OTIS M. UNDERWOOD, JR.

Defendant/Appellant.

_____________________________/

PHILLIP B. MAXWELL & ASSOCIATES, PLLC
Phillip B. Maxwell (P24872)
Attorney for Defendant/Appellant
57 N. Washington St.
Oxford, MI 48371
248-969-1490
phillip@pbmaxwell.com

LEONARD & KRUSE, P.C.
By: Kelly A. Kruse (P45538)
Norbert B. Leonard (P40056)
Attorneys for Plaintiffs/Appellees
4190 Telegraph Rd., Ste. 3500
Bloomfield Hills, MI 48302
248-594-7500
kkruse@leonardkruse.com

_____________________________/

DEFENDANT/APPELLANT'S REPLY BRIEF

Dated: December 1, 2017

TABLE OF CONTENTS

Index of Authorites..........iii

Statement of Facts..........1

Argument..........5

RECEIVED by MSC 12/1/2017 2:51:32 PM

INDEX OF AUTHORITIES

CASES

Chevron USA, Inc. v. Exchazabal, 536 U.S. 73, 80-81; 122 S. Ct. 2045; 153 L. Ed.2d 82 (2002)..6

Hackel v. Macomb County Comm, 298 Mich App 311, 324; 826 NW2d 753 (2012):..................5

Sandusky Grain Co. v. Borden's Condensed Milk Co., 214 Mich 306, 311; 183 NW2d 218 (1921)..5

COURT RULES

MCR 7.212..7

MCR 7.305(B)(5)(b)..5

RECEIVED by MSC 12/1/2017 2:51:32 PM

STATEMENT OF FACTS

Appellees, in their brief, seek to confuse the issues with irrelevant facts. They seek to show that Defendant breached the agreement which is the subject of this action (Exhibit A appended hereto) by failing to use all reasonable efforts to obtain an occupancy permit for the property which Appellees sought to lease. However, under the agreement, in the event of breach, there was only one remedy for breach, which was to declare a default and terminate the agreement, which Appellees did. See Exhibit B appended hereto. That should end the inquiry.

Mr. Underwood is a long-time member of the Oakland County Bar, first admitted to practice in 1970. He owns several rental properties in Oakland County, including 18 S. Broadway, Lake Orion, a 19th Century storefront and the subject of this suit. In early 2004, this building was destroyed by a fire which began in an adjoining building which houses the popular Lake Orion restaurant, Sagebrush Cantina, and spread to the subject property. By the time the fire was extinguished only the north and south walls of the building remained standing. Ex. C hereto, Underwood Dep., p. 12.

Mr. Underwood's reconstruction of the building weathered a contentious relationship with the Orion Township building authorities, which eventually resulted in a circuit court action and a consent agreement. Ex. C hereto, Underwood dep. p. 41. Mr. Underwood testified that after the fire, the owner of Sagebrush Cantina made several overtures to purchase his property. When these offers were refused, Sagebrush purchased an adjoining ice cream parlor which Mr. Underwood described it as "a squeeze play" by the Village which had refused to approve a rebuild for the parlor. Ex. C, Underwood Dep., p. 41.

RECEIVED by MSC 12/1/2017 2:51:32 PM

RECEIVED by MSC 12/1/2017 2:51:32 PM

When Plaintiffs/Appellees, potential tenants for the second floor, along with Reggie Sager, a potential tenant for the first floor, contacted Mr. Underwood, the shell of the building had been completed, with sub-floors down, but not finish flooring. The walls were exposed wooden studs. The operating systems, electrical, HVAC, plumbing, fire suppression systems, and elevator were installed but were not "finished," e.g. no electrical plugs, toilets, heat outlet covers, etc. Ex. C, Underwood dep. p. 25. These finish items depended upon the use to be made of the space. There were no partitions or special use plumbing, e.g. water supply and drains. These finish use items have to be displayed in an architect's plan, which is presented to the Orion Township building authorities for review, and, if approved, a building permit is issued. Ex. C, Underwood Dep., p. 34. The contractors are then responsible for supplying service in compliance with building codes *per* the plan. After successful building inspections by the Township, a certificate of occupancy is issued.

On May 5, 2014 the parties executed Exhibit A, basically an agreement to agree to lease[1]. The agreement was informed by Mr. Underwood's prior difficulties with the township building authorities.

> This letter agreement will serve as a **preliminary contract** for the lease of 18 S. Broadway, Lake Orion MI. This **preliminary agreement** is written in outline form because **some of the details of the duties that both parties are undertaking are not presently known, and may be presently unknowable, because of the governmental authorities that may require approvals not presently known to one or both of the parties**. These approvals are necessary to open and conduct business, the failure of which will/may impair further duties that each of the parties owe to the other party. Ex. A, p. 1. (**emphasis added**)

[1] An identical letter of intent was signed with Ms. Sager on behalf of Exclusive Salon Suites for the street level floor for a hair dressing salon. Ms. Sager withdrew her offer to lease by email letter of December 28, 2014 after a letter proposing a new contract on behalf of both tenants was not agreeable to Landlord.

The agreement did not obligate Plaintiffs/Appellees to lease the property. The only obligations upon them were completion of a credit application, the provision of a detailed plan for build out of the proposed space and application to the Village of Lake Orion for a use permit. According to Mr. Underwood's testimony, the Plaintiffs completed their credit application, and obtained the use permit but never provided the plan for the build out, the requirements of which were are set out in Paragraph 4 of Ex. A. Mr. Underwood testified that their default compelled him to retain an architect at his own expense, which occasioned at least three months of delay. He hired Brian Gill of TDG Architects, to provide the detailed plan so that he could apply for a building permit. Ex. C, Underwood dep., pp. 33-34, 38, and submitted that plan to the Orion Township building authorities with his application for a building permit on 9/22/14. It was at that meeting that his anticipated difficulties with the township emerged, a meeting which he described as "hostile." The inspectors rejected the plans of Mr. Underwood's architect, Ex. C, Underwood Dep., p. 46.

The inspectors claimed that their file, which Underwood was not permitted to examine, contained no inspection reports approving the footings or the masonry for the reconstruction. Mr. Underwood knew this to be untrue because he had been present when the inspections were performed. Ex. C, Underwood Dep., pp. 40-42. This new requirement would necessitate removing wall coverings to expose the masonry. The inspectors further insisted that the foundation cinder blocks be exposed to determine whether they had been cored with rebar and mortar. Ex. C, Underwood Dep., p. 41. As a result, Mr. Underwood had to hire an engineer to inspect the building and examine photographs of its re-construction and submit a sealed engineer's letter to the effect that the building was structurally sound. This could not be accomplished until mid-October 2014. Ex. C, Underwood Dep., pp. 43-44, 69. As a

RECEIVED by MSC 12/1/2017 2:51:32 PM

consequence, the issuance of building permit was held up until early December, 2014. Ex. C, Underwood Dep. p. 81, Ex. 17. Ms. Kruse's brief on this issue, besides being irrelevant, is false and she seeks to convey the impression that Mr. Underwood took no steps to obtain a permit until December. If her clients had fulfilled their obligation to provide a detailed plan, Mr. Underwood could have applied for the permit sooner that 9-22-14, but the township authorities, with their bogus, retributive requirements, occasioned the additional 90 days of delays.

Plaintiffs' complaint claims that completion dates for of the finish construction, conveyed orally, were not met. The letter of intent, however, provided no completion dates for the project and explained why in the opening paragraph, already cited. In fact, the letter of intent did not even obligate Plaintiffs to lease the space. Paragraphs 8 & 10 clearly state that if Plaintiffs are not satisfied with the build out there is no obligation to lease. *Per* Paragraph 10, their sole remedy was "to declare a default and terminate the preliminary agreement" which they did. Ex. A hereto.

> 8. At the lease signing, tenant will have inspected the premises under the lease and sign a written declaration that they are satisfied that the premises is in good condition and accepts occupancy in an as-is condition.
>
> 10. The failure of either party to perform the preliminary duties outlined in this letter agreement will permit the obligee to declare a default and terminate the preliminary agreement to lease or other remedy that may be agreed to by the parties.

Delays were also encountered because of the difficulty of obtaining an elevator inspection. Ex. C, Underwood Dep., pp. 51-52.

All of these obstacles occasioned delay. The Plaintiffs pressed Mr. Underwood for a firm date, and he told them that was not possible. Ex. C, Underwood Dep., pp. 62-64. Plaintiffs then told Mr. Underwood that they were moving out of their present business space. Mr. Underwood

RECEIVED by MSC 12/1/2017 2:51:32 PM

suggested, because of the difficulties he was experiencing with the township, that Plaintiffs remain where they were on a month-to-month basis. Ex. C, Underwood Dep., p. 65-66. Plaintiffs did not heed Defendant's advice. Frustrated with what Mr. Underwood had warned might be a frustrating process, they terminated the agreement. Ex. B. Now they are attempting to get a second bite of the apple, to which they are not entitled.

ARGUMENT

1. Compliance with MCR 7.305(B)

Appellee claims that Appellant has not complied with MCR 7.305 (B). That is false. Section 1 of Appellant's Brief in Support demonstrated compliance with MCR 7.305(B)(5)(b) in describing the conflict of the majority opinion with Michigan Supreme Court authority. As Justice O'Brien pointed out so cogently in her dissent, the majority ignores long standing rules of construction and essentially rewrites the contract for the parties. The central decision is *Sandusky Grain Co. v. Borden's Condensed Milk Co.,* 214 Mich 306, 311; 183 NW2d 218 (1921) ("Courts may not arbitrarily read provisions out of or into [parties'] contracts in order to make [a party] liable or make new contracts for [the obligors] and the obligees." This aspect of the majority's decision does far more offence to precedent than its refusal to apply the rule of construction known as *expressio unius est exclusio alterius* although the application of that rule would have led to the result urged by Justice O'Brien.

As explained by this court in *Hackel v. Macomb County Comm*, 298 Mich App 311, 324; 826 NW2d 753 (2012):

> In addition, the Executive's argument fails under "the doctrine of *expressio unius est exclusio alterius*, or inclusion by specific mention excludes what is not mentioned." *Id.* at 448. This doctrine is "a rule of construction that is a product of logic and common sense. The doctrine

RECEIVED by MSC 12/1/2017 2:51:32 PM

characterizes the general practice that when people say one thing they do not mean something else." Id. at 456 (citations and quotation marks omitted).

The U.S. Supreme Court similarly endorses this rule. *Chevron USA, Inc. v. Exchazabal*, 536 U.S. 73, 80-81; 122 S. Ct. 2045; 153 L. Ed.2d 82 (2002).

The majority essentially seeks to rewrite the parties' contract. Mr. Underwood went to considerable lengths to explain why he could not provide a completion date. Appellees seek to cast Underwood in a false light because of his struggles with the township building authorities but as is pointed out in the statement of facts, it was the township that seemed to be in a "get even with the lawyer" mood and was largely the cause of the delays.

The clear thrust of the contract was, Underwood could not promise when the project would be complete. He explained why. He encountered gamesmanship from the township authorities. Appellee grew frustrated and then withdrew, exercising the only remedy she had available, walking away. Ms. Kruse's February 18, 2015 letter refers to the exercise of her clients' sole remedy "...please consider this letter *notice of my clients' decision to terminate their interest in and any and all obligations regarding the property...*" Ex. B to Appellant's Application for Leave. Ms. Kruse in her brief fudges the effect of her termination letter, seeking to characterize her termination letter as "notice that they could no longer wait for Defendant to make the premises habitable," and "Plaintiffs gave notice to Defendant of his breach of the agreement," at p. 12 of her brief. Nonsense. She gave notice of the termination of her clients' interest in the agreement. She exercised the only remedy available to her clients and that should be the end of the inquiry.

The majority tortures the word, "permit" in an effort to rewrite the language of the contract, but Justice O'Brien's hits the mark when she states:

RECEIVED by MSC 12/1/2017 2:51:32 PM

> Based on my reading of the contract, the word "permit" is used in the sense that the plaintiffs have permission to pursue one of the agreed upon remedies in the event that Underwood does not fulfill his duties under the agreement. In other words, "permit" is permissive with regard to whether or not plaintiffs chose to pursue one of the agreed upon remedies, not with regard to the remedies themselves.

This is the language in question:

> The failure of either party to perform the preliminary duties outlined in this letter agreement will permit the obligee to declare a default and terminate the preliminary agreement to lease or other remedy that may be agreed to by the parties.

There were no other remedies agreed on by the parties. The Appellees availed themselves of the remedy to walk away, as Ms. Kruse's letter so clearly states.

2. Reply Brief?

Ms. Kruse's claim that Defendant's ultimate defense had to be raised in its primary brief before the trial court, not in its Reply Brief, and in argument finds no support in the law. She can only cite MCR 7.212 and to cases dealing with appellate court argument.

3. Latent Ambiguity?

The claims regarding latent ambiguity are also bogus, dredging up 30-year-old code violations which Appellees claim they should have been advised of. The agreement forewarned them that " … governmental authorities that may require approvals not presently known…" (Ex. A, p. 1), as in fact happened. She seeks to show a conflict between the agreement which her clients signed and the lease which they didn't sign, regarding remedies; that might carry some weight if the lease had been signed.

RECEIVED by MSC 12/1/2017 2:51:32 PM

RECEIVED by MSC 12/1/2017 2:51:32 PM

4. **An Illusory Remedy?**

Ms. Kruse has to resort to UCC law to assert that the remedy clause provided an illusory remedy, contrary to public policy. That case law doesn't apply. Appellees had remedies. If they thought Mr. Underwood had breached, they could declare a default and terminate or attempt to negotiate some other resolution. They elected to terminate the agreement.

5. **Conclusion.**

The majority opinion does violence to long-standing Supreme Court precedent and should be reversed.

PHILLIP B. MAXWELL & ASSOCIATES, PLLC

Dated: 12-1-17

/s/ *Phillip B. Maxwell*
Phillip B. Maxwell (P24872)
phillip@pbmaxwell.com
Attorney for Appellant
20 Hudson St.
Oxford, MI 48371
248-969-1490