STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0201

Ellis Properties, LLP,
Appellant,

vs.

Northland Pallet, Inc.,
Respondent.

Filed April 7, 2009
Affirmed
Lansing, Judge

Hennepin County District Court
File Nos. 27-CV-07-9918, 02-C6-07-001709

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Considered and decided by Lansing, Presiding Judge; Kalitowski, Judge; and Stoneburner, Judge.

U N P U B L I S H E D O P I N I O N

LANSING, Judge

On appeal from summary judgment in a dispute over the terms of a commercial-property lease, the property owner argues that the district court erred when it interpreted the terms to release the tenant from liability for roof-collapse damages, failed to consider

extrinsic evidence of contractual intent, and concluded that the anti-subrogation rule barred the property owner's direct claims against the tenant. Because the district court properly construed the leases and addenda, we affirm. Consequently, we do not reach the alternative holding that relies on the anti-subrogation rule.

F A C T S

Northland Pallet, Inc. leased warehouse space from Ellis Properties, LLP under four separate lease agreements that contain essentially identical terms. When Ellis acquired the warehouse-office property in 1999, Northland was a tenant. Ellis and Northland continued the rental relationship and entered into additional leases and addenda over the next six years. In September 2005 a Northland employee backed a forklift into a support beam and a portion of the roof collapsed.

Ellis sought to collect from Northland the amounts necessary to repair the damage. When Northland did not pay, Ellis entered into a loan-receipt agreement with its own insurer. The terms of that agreement provided Ellis with an interest-free loan from its insurer in consideration for Ellis's agreement to maintain an action against Northland to recover the amount of the loan.

In February 2007 Ellis sued Northland, and, six months later, Northland moved for summary judgment. At the hearing on the summary-judgment motion, Northland and Ellis each asserted that the relevant provisions of the leases and addenda were unambiguous and compelled judgment in its favor. Northland asserted that under paragraph 15 of the leases Ellis was responsible for any damages covered by its insurance policy. Paragraph 15 requires Ellis to maintain insurance and waives any liability claims

against Northland for insurable losses whether or not the losses were caused by negligence:

> CASUALTY INSURANCE:
>
> 15. a. Lessor shall at all times during the Term of this Lease, at its expense, maintain a policy or policies of insurance . . . insuring the Building against loss or damage by fire, explosion, or other insurance hazards and contingencies . . . .
>
> c. Lessor hereby waives and releases all claims, liability, and causes of action against Lessee and its agents, servants, and employees, for loss or damage to, or destruction of, the Premises, or any portion thereof, including the Buildings or other improvements situated thereon, resulting from fire, explosion, and other perils included in standard extended coverage insurance, whether caused by the negligence of any of said person or otherwise.

In addition to arguing that it was absolved from liability under paragraph 15's waiver provision, Northland also argued that Ellis's claim was barred by the anti-subrogation rule.

Ellis disputed Northland's argument and took the contrary position that a maintenance provision in a 2005 lease addendum governed the liability for the damages to the roof. This maintenance addendum requires Ellis to be responsible for roof repair unless Northland is responsible for damage, in which case Northland must pay the costs and expenses incurred:

> MAINTENANCE:
>
> . . .
> LESSOR shall be responsible for electrical service to the building and for roof repair. If it becomes known that LESSEE is responsible for damage to these items, then

> LESSEE will be responsible for all costs and expenses incurred, and such costs and expenses will be due upon receipt.

Ellis acknowledged that the 2005 addendum expressly incorporated the terms and conditions of the previous leases but nonetheless asserted that the maintenance provision superseded the liability waiver in the original leases.

The district court granted Northland's motion for summary judgment, concluding that Ellis was responsible for insured losses. The district court reasoned that the seemingly contradictory lease provisions could be harmonized by reading them to place liability on Ellis for insured losses and on Northland for uninsured losses caused by its agents or employees. The district court alternatively concluded that the anti-subrogation rule barred Ellis's claims. Ellis appeals.

D E C I S I O N

Our review of the district court's grant of summary judgment centers on whether there are any genuine issues of material fact and whether the district court correctly applied the law. *Yang v. Voyagaire Houseboats, Inc.*, 701 N.W.2d 783, 788 (Minn. 2005). When there are no genuine issues of material fact and the appeal turns on purely legal issues, our review is de novo. *Progressive Specialty Ins. Co. v. Widness ex rel. Widness*, 635 N.W.2d 516, 518 (Minn. 2001); *see also Dorsey & Whitney LLP v. Grossman*, 749 N.W.2d 409, 417-19 (Minn. App. 2008) (holding that both determination of contract ambiguity and interpretation of unambiguous contract are questions of law, subject to de novo review).

"[T]he primary goal of contract interpretation is to determine and enforce the intent of the parties." *Motorsports Racing Plus, Inc. v. Arctic Cat Sales, Inc.*, 666 N.W.2d 320, 323 (Minn. 2003). When the language of the contract is unambiguous, the contract must be enforced according to "its plainly expressed intent." *Imlay v. City of Lake Crystal*, 444 N.W.2d 594, 600 (Minn. App. 1989), *aff'd in part and rev'd in part on other grounds* (Minn. Oct. 25, 1989). Importantly, however, a reviewing court must "construe a contract as a whole [to] harmonize all provisions, if possible, and to avoid a construction that would render one or more provisions meaningless." *Stiglich Constr., Inc. v. Larson*, 621 N.W.2d 801, 803 (Minn. App. 2001) (citing *Chergosky v. Crosstown Bell, Inc.*, 463 N.W.2d 522, 525-26 (Minn. 1990)), *reviewed denied* (Minn. Jan. 30, 2001). "Where there is an apparent conflict between two clauses or provisions of a contract, it is the court's duty to find harmony between them and to reconcile them if possible." *Oster v. Medtronic, Inc.*, 428 N.W.2d 116, 119 (Minn. App. 1988).

Applying these principles, we conclude that the 2005 addendum holds Northland liable for causing roof damage only when the damage is not covered by Ellis's insurance. This construction gives effect to both provisions, while Ellis's preferred construction would read the liability waiver out of the lease. *See, e.g.*, *Stiglich*, 621 N.W.2d at 802-03 (rejecting construction of arbitration agreement that would effectuate provision on claims subject to arbitration but would disregard reservation-of-rights provision).

Ellis asserts that the maintenance provision of the 2005 addendum—as a later expression of the parties' intent—should control. This may be true to the extent that terms in the later document directly conflict with the earlier documents. For instance, the

amount of rent specified in the later document should control. *See City of Minneapolis v. Republic Creosoting Co.*, 161 Minn. 178, 188, 201 N.W. 414, 418-19 (1924) (holding that quantity of material specified in later contract superseded quantity specified in earlier, incorporated contract). But when contractual provisions can be reconciled, the earlier, incorporated document is equally effective. *See id.* at 188, 201 N.W.2d at 419 (holding that notice provision in earlier contract remained effective because later contract did not conflict).

In its appeal to this court, Ellis primarily argues that the lease is ambiguous and that the district court therefore erred by failing to consider extrinsic evidence of contractual intent. Ellis took the opposite position in the district court, contending that the agreement was unambiguous. Thus, the argument has been waived and we need not consider it. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (explaining that "reviewing court must generally consider only those issues that the record shows were presented and considered by the trial court in deciding the matter before it" (quotation omitted)).

Even if Ellis had identified an ambiguity that would permit the consideration of extrinsic evidence, however, it has failed to provide any. By affidavit, Ellis officer Ray Ellis asserts an interpretation of the 2005 maintenance addendum that essentially parallels the legal argument in Ellis's brief. The affidavit provides no *extrinsic* evidence of intent. In other words, the affidavit does not address the factual circumstances or motivations underlying the 2005 addendum or its maintenance provision. Thus, whether or not the

district court was permitted to consider extrinsic evidence, it does not appear that it was given any to consider.

In sum, the district court properly construed the leases and addenda to relieve Northland of responsibility for insured losses. Because summary judgment was properly granted on this ground, we do not reach the district court's alternative holding that the anti-subrogation rule barred Ellis's claim.

Affirmed.