

No. 46071-8-II

DIVISION II, COURT OF APPEALS  
OF THE STATE OF WASHINGTON

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MICHAELS STORES, INC.,

Plaintiff-Respondent

v.

RPAI LAKEWOOD, L.L.C. f/k/a INLAND WESTERN LAKEWOOD,  
L.L.C.,

Defendant-Appellant

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ON APPEAL FROM PIERCE COUNTY SUPERIOR COURT  
(Honorable Ronald E. Culpepper)

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**BRIEF OF RESPONDENT**

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## I. INTRODUCTION

The commercial lease between RPAI Lakewood L.L.C. (“RPAI”) and Michaels Stores, Inc. (“Michaels”) recognizes that the success of Michaels’ store is dependent in large part upon RPAI’s ability to attract anchor tenants to the Lakewood Towne Center. Anchor tenants help bring customer traffic to the center, which is important to all of the center’s retailers. If RPAI fails to satisfy this “Co-Tenancy Requirement,” the lease gives Michaels a right to terminate “for so long as such non-satisfaction” continues. The lease does not give RPAI the same right. Because it is RPAI’s exclusive obligation to satisfy the Co-Tenancy Requirement, the lease gives RPAI a right to terminate only “at the end of the fourteenth (14<sup>th</sup>) month” of non-satisfaction; if RPAI does not exercise that right, it must accept a reduced amount of rent from Michaels until it finds enough anchor tenants to again satisfy the Co-Tenancy Requirement.

RPAI failed to satisfy the Co-Tenancy Requirement, yet Michaels has not chosen to terminate the lease; it has remained committed to the Lakewood Towne Center location and, indeed, it exercised an option to extend the lease by five years. Likewise, RPAI did not terminate the lease at the end of fourteen months of non-satisfaction, choosing instead to continue accepting Michaels’ reduced rent. RPAI now apparently regrets that decision. Even though it had no right to do so, three years after the

initial non-satisfaction of the Co-Tenancy Requirement, RPAI threatened to terminate the lease unless Michaels agreed to resume paying the full amount of rent. Michaels began paying under protest and brought this declaratory judgment action to restore its rights. The trial court agreed with Michaels, and granted its motion for summary judgment.

This Court must affirm. The lease was negotiated by sophisticated commercial parties, and its terms are both unambiguous and commercially reasonable. The parties used the term “for so long as” to describe a continuing right to terminate. They specifically chose to use that term in Michaels’ termination clause, but not RPAI’s. For RPAI, they chose a different, but equally unambiguous, term granting a one-time option to terminate “at” the end of the fourteenth month of non-satisfaction. There is no extrinsic evidence that contradicts the parties’ clear manifestation of intent. This Court should reject RPAI’s invitation to re-write the plain terms of their agreement simply because RPAI now regrets the bargain it struck and/or its failure to timely terminate the lease.

## **II. COUNTERSTATEMENT OF THE ISSUE**

Did the trial court properly conclude as a matter of law that the Co-Tenancy Requirement of the parties’ Lease gave RPAI a one-time right to terminate, and that RPAI failed to timely exercise that right? **Yes.**

### III. COUNTERSTATEMENT OF THE CASE

#### A. Factual Background

On August 10, 2001, Michaels entered into a lease agreement with RPAI's predecessor for space in the Lakewood Towne Center, a retail shopping center located in Lakewood, Washington (the "Lease"). CP 199 (Morehouse Decl., ¶ 2); CP 204-348 (Lease). The Lease was set to expire on February 28, 2012, but contained options for three five-year extensions. *Id.* Michaels exercised the first of these options, extending the lease term to February 28, 2017. CP 200 (Morehouse Decl., ¶ 3); CP 350-51. The Lease was negotiated by sophisticated commercial entities, represented by counsel, and is to be construed under Washington law with equal weight given to the rights and obligations of both parties. CP 236 (§§ 17.3, 17.4).

The Lease contains an "On-Going Co-Tenancy Requirement." CP 233-34 (§ 16.3 of Exhibit C). At bottom, this Co-Tenancy Requirement reflects the parties' basic agreement that the Lease, and the amount of rent Michaels agreed to pay, is conditioned upon RPAI's obligation ensure that the center maintains a certain number of large, so-called "Anchor Tenants" to draw customer traffic. Under this provision, RPAI must lease at least 70% of the total square footage of the center to Anchor Tenants; if it cannot do so for any six month period, then Michaels can choose to pay

an “Alternative Rent” in lieu of the standard “Minimum Rent” until and unless RPAI can again satisfy the Co-Tenancy Requirement. CP 233.

Equally important, and at the core of the parties’ dispute, the Co-Tenancy Requirement contains provisions giving both parties a right to terminate the Lease upon certain conditions. With respect to Michaels’ right to terminate, the Co-Tenancy Requirement provides in relevant part:

In addition to the rights of Tenant to pay “Alternative Rent”, if ... non-satisfaction of the On-Going Co-Tenancy Requirement shall continue for a period of twelve (12) months beyond the initial failure to meet the On-Going Co-Tenancy Requirement and for so long as such non-satisfaction shall continue, ... Tenant shall have the right to terminate this Lease by sixty (60) days written notice delivered to Landlord.

CP 234. Thus, when it is triggered, Michaels’ right to terminate continues until the non-satisfaction is cured. In contrast, RPAI’s right to terminate, which appears later in the same section, provides in full:

Landlord shall likewise have a right to terminate this Lease at the end of the fourteenth (14<sup>th</sup>) month following the initial nonsatisfaction of the Co-Tenancy Requirement by giving sixty (60) days prior written notice to Tenant of the termination.

*Id.* This provision goes on to state that, if RPAI gives a valid notice of termination, Michaels has an opportunity to avoid termination if it agrees to resume paying RPAI the full Minimum Rent. *Id.*

Gottschalks closed its store at the Lakewood Towne Center on or around May 31, 2009. CP 200 (Morehouse Decl., ¶ 5); CP 162 (Answer, ¶ 11). There is no dispute that Gottschalks was an “Anchor Tenant” and,

thus, its closure triggered the Lease's Co-Tenancy Requirement, including Michaels' right to pay the Alternative Rent if RPAI could not cure the breach within six months—which RPAI did not do. *Id.*; CP 198 (RPAI Ans. to Interrogatory No. 2). Michaels therefore informed RPAI that it would pay the Alternative Rent beginning on November 15, 2009. CP 353. Michaels duly paid the Alternative Rent for the next three years without complaint from RPAI or any indication that RPAI believed it had a continuing right to terminate the Lease. CP 200 (Morehouse Decl., ¶ 8).

July 31, 2010 marked the end of the fourteenth month following the initial non-satisfaction of the Lease's Co-Tenancy Requirement. *Id.* (¶ 7). RPAI did not give Michaels notice on or before that date that it had elected to terminate the Lease pursuant to the Co-Tenancy Requirement—which Michaels relied upon when it subsequently decided to exercise its option to extend the Lease for another five years. *Id.* (¶¶ 3, 7). It wasn't until more than two years later, on December 14, 2012, that RPAI first sent Michaels a notice of termination. CP 355. The letter notified Michaels that RPAI would terminate the Lease in sixty days unless Michaels agreed to resume paying the Minimum Rent. *Id.*

Michaels responded on January 10, 2013. CP 357. Citing the plain language of the Co-Tenancy Requirement, Michaels pointed out that more than fourteen months had passed following the initial non-

satisfaction of the requirement and, thus, RPAI no longer had a right to terminate. *Id.* Michaels informed RPAI that it intended to continue paying the Alternative Rent until RPAI satisfied the Co-Tenancy Requirement. *Id.* RPAI nevertheless refused to rescind the termination notice. CP 201 (Morehouse Decl., ¶ 13). So, beginning January 30, 2013, Michaels began paying the Minimum Rent under protest, reserving its right to pursue available remedies against RPAI. CP 359-66.

#### **B. Procedural Background**

On April 12, 2013, Michaels filed this declaratory judgment action, seeking a determination that RPAI failed to timely exercise any right it had to terminate the Lease under the Co-Tenancy Requirement. CP 1-7. Michaels also sought an award of damages from RPAI of the difference between the Minimum Rent it had been paying under protest and the Alternative Rent that it actually owed. *Id.* RPAI answered, contending that the Lease's Co-Tenancy Requirement permitted it to give notice of termination "any time after the conclusion of the 14<sup>th</sup> month following the initial Co-Tenancy failure." CP 163 (Answer, ¶ 16).

Michaels moved for summary judgment, arguing that the plain language of the Co-Tenancy Requirement did not give RPAI a continuing right to terminate the Lease. CP 179-91. RPAI opposed and argued, among other things, that Michaels' interpretation (and continued payment

of Alternative Rent) was “unfair” because it was unlikely that RPAI could find an Anchor Tenant in the future. CP 367-87; CP 388-390 (Short Decl.). RPAI argued in the alternative that the Co-Tenancy Requirement was ambiguous, although RPAI did not provide the court with any extrinsic evidence to resolve the purported ambiguity, nor did it identify any disputed facts that remained for trial. *Id.*

The trial court heard argument on January 10, 2014. In the end, the court agreed with Michaels’ interpretation: “I think they did have a right to terminate [the Lease] at the end of the 14th month. They waived that, and I’m going to grant summary judgment to Michaels on ... the language of the contract.” VRP 36:11-15. The court entered an order granting summary judgment in favor of Michaels, prohibiting RPAI from terminating the Lease, and awarding Michaels damages in the amount of the difference between the Alternative Rent and the Minimum Rent it had been paying since January 2013. CP 404-05. A final judgment, including an award of fees, followed. CP 407-08. RPAI appealed. CP 411-14.

#### **IV. ARGUMENT**

##### **A. Standard of Review.**

This Court reviews summary judgment *de novo*, engaging in the same inquiry as the trial court and viewing the facts and all reasonable inferences in the light most favorable to the nonmoving party. *Hearst*

*Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 501, 115 P.3d 262 (2005). Summary judgment is proper if the pleadings, depositions, answers to interrogatories, admissions, and affidavits show that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. CR 56(c); *Hearst*, 154 Wn.2d at 501.

Washington follows the objective manifestation theory of contract interpretation, under which courts ascertain the parties' intent "by focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties." *Id.* at 503. Courts must give words used their ordinary, usual, and popular meaning unless the contract as a whole shows a contrary intent. *Id.* Under the context rule, a court can consider extrinsic evidence to determine the meaning of specific words and terms. *Id.* at 502-03. Extrinsic evidence may not, however, be used to "show an intention independent of the instrument' or to 'vary, contradict or modify the written word.'" *Id.* at 503 (citation omitted).

Interpretation of an unambiguous contract is a question of law for which summary judgment is appropriate. *Mayer v. Pierce County Med. Bureau, Inc.*, 80 Wn. App. 416, 420, 909 P.2d 1323 (1995). A contract is ambiguous only if its terms are subject to more than one meaning, but a court will not find ambiguity simply because the parties suggest opposing meanings. *Id.* at 421. If a contract can reasonably be interpreted in two

ways, one of which is ambiguous and one of which is not, the latter interpretation should be adopted when each clause can be given effect. *Dice v. City of Montesano*, 131 Wn. App. 675, 685, 128 P.3d 1253 (2006).

**B. The Lease Does Not Give RPAI A Continuing Right To Terminate; Its Right Expired At The End Of The Fourteenth Month Of Non-Satisfaction Of The Co-Tenancy Requirement.**

The trial court properly concluded there was only one reasonable interpretation of the Lease. The Co-Tenancy Requirement gives each party a right to terminate the Lease, but each party's right is different. Michaels has continuing right to either pay Alternative Rent or terminate the Lease if RPAI cannot satisfy the Co-Tenancy Requirement within twelve months. RPAI, on the other hand, has a one-time right to terminate at the end of fourteen months of non-satisfaction and, if it does not do so, RPAI must accept Alternative Rent in lieu of Minimum Rent until it can satisfy the Co-Tenancy Requirement. This interpretation is compelled by the Lease's clear language, and is also inherently reasonable in context.

1. The Lease Is Unambiguous.

The parties do not dispute the plain meaning of the Co-Tenancy Requirement as it relates to Michaels' right to terminate. It states:

In addition to the rights of Tenant to pay "Alternative Rent", if (a) the non-satisfaction of the On-Going Co-Tenancy Requirement shall continue for a period of twelve (12) months beyond the initial failure to meet the On-Going Co-Tenancy Requirement and *for so long as such non-satisfaction shall*

*continue*, or (b) the Initial Co-Tenancy Requirement is not satisfied within six (6) months after the date on which the Rental Commencement Date would otherwise have occurred but for the failure to satisfy the initial Co-Tenancy Requirement, and *for so long as such non-satisfaction shall continue, Tenant shall have the right to terminate this Lease* by sixty (60) days written notice delivered to Landlord.

CP 234 (emphasis added). The parties expressly used the modifier “for so long as such non-satisfaction shall continue” to manifest their intent to grant Michaels a *continuing* right to terminate the Lease if and “for so long as” RPAI cannot satisfy either of two conditions precedent.

RPAI argues that the parties intended to “balance” termination rights. Op. Br. at 9. But as the trial court correctly recognized, the Lease shows just the opposite. The parties intended to grant RPAI a different right to terminate, and they used different language to describe that right:

*Landlord shall likewise have a right to terminate this Lease at the end of the fourteenth (14<sup>th</sup>) month* following the initial nonsatisfaction of the Co-Tenancy Requirement by giving sixty (60) days prior written notice to Tenant of the termination.

*Id.* (emphasis added). This clause omits the “for so long as” modifier the parties used to describe Michaels’ continuing right to terminate and, instead, incorporates language—“at the end of the fourteenth ... month”—that unambiguously fixes a deadline on RPAI’s right to terminate. Here, there is no dispute that RPAI did not terminate the Lease “at” the end of the fourteenth month of non-satisfaction, which was July 31, 2010.

This Court must give effect to the plain and ordinary meaning of the words the parties used to describe their respective termination rights. *Hearst*, 154 Wn.2d at 503. Had the parties intended to give Michaels and RPAI an identical continuing right to terminate, as RPAI insists, they would have used the unambiguous “for so long as” modifier in both termination clauses. They didn’t, and their choice to omit that language from RPAI’s clause must be deemed deliberate. *Markel American Ins. Co. v. Dagmar’s Marina, LLC*, 139 Wn. App. 469, 480, 161 P.3d 1029 (2007) (when “the drafter of an agreement employs different terms instead of parallel terminology, the presumption has to be that the change in usage was purposeful and reflects different and not parallel meaning.”).

RPAI’s suggested meaning, on the other hand, violates settled rules of interpretation. Either the Court would have to impermissibly replace the word “at” with “after” and/or add the “for so long as” modifier into RPAI’s termination clause.<sup>1</sup> *Little Mountain Estates Tenants Ass’n v. Little Mountain Estates MHC, LLC*, 169 Wn.2d 265, 270 n. 3, 236 P.3d 193 (2010) (“Courts do not have the power, under the guise of

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<sup>1</sup> If RPAI’s interpretation were accepted, the termination clause would read: “Landlord shall likewise have a right to terminate this Lease ~~at~~ **after** the end of the fourteenth (14<sup>th</sup>) month following the initial non-satisfaction of the Co-Tenancy Requirement **and for so long as such non-satisfaction shall continue** by giving sixty (60) days prior written notice of termination.” (Emphasized words and strike-outs added.)

interpretation, to rewrite contracts which the parties have deliberately made for themselves.”). Or, it would have to impermissibly ignore as superfluous the “for so long” modifier in Michaels’ termination clause. *Snohomish Cty. Public Transp. Benefit Area Corp. v. FirstGroup America, Inc.*, 173 Wn.2d 829, 840, 271 P.3d 850 (2012) (“An interpretation of a contract that gives effect to all provisions is favored over an interpretation that renders a provision ineffective, and a court should not disregard language that the parties have used.”). Of course, it can do neither.

RPAI repeatedly argues that the Lease cannot mean what it says because, in that case, its right to terminate would be “limited to a single day at the end of the fourteenth (14<sup>th</sup>) month” of non-satisfaction. Op. Br. at 1, 6, 9. Nonsense. Here, too, the plain language of the Lease shows that RPAI had a one-time option to terminate, not a one-day option. The termination clause states that RPAI has a right to terminate “at” the end of the fourteenth month; it does not state that RPAI must give notice “on” that day. RPAI thus could have given notice at any time *before* the end of the fourteenth month so that the termination itself could take effect on that date. Regardless, there can be no dispute that the word “at” does not mean the same thing as “after”—and if the parties intended to give RPAI a continuing right to terminate, they would have used the latter word.

RPAI concedes, as it must, that there is no specific language in the Lease granting it a continuing right to terminate. Rather, RPAI's entire argument turns on the word "likewise" in RPAI's termination clause. Op. Br. at 5-6. RPAI argues the parties used the word "likewise" as a form of short-hand to give RPAI all the same rights of termination as Michaels, just without all the language. *Id.* at 6, 11. Not only does this argument ignore the words the parties actually used and the rules of interpretation, it is entirely implausible to infer that the parties drafted RPAI's termination clause, of all things, with an eye towards efficiency; after all, the Lease contains more than 50-pages of single-spaced and often redundant "legalese." *See, e.g.*, CP 225 (Section 5.3's indemnity clause expressly sets forth separate, but virtually identical, rights for both parties). Nothing in the Lease nor any extrinsic evidence remotely supports that inference.

RPAI puts too much stock in the word "likewise" in any event. RPAI admits its interpretation is "not a perfect" use of the word. Op. Br. at 6. It is not even close. Giving the word its common meaning, the word serves as a transition between the two termination clauses to show that, like Michaels, RPAI also has a right to terminate. Webster's Collegiate Dictionary 675 (10th ed. 1993) (likewise means "[i]n like manner" or "in addition"). To say that RPAI *also* has a right to terminate does not mean it has an *identical* right—and to ascribe such a meaning to the word

“likewise” would stretch its ordinary usage beyond the breaking point. Indeed, had the parties intended to use a single word to give RPAI all the same termination rights as Michaels, they would not have used an adverb to modify the verb “shall”; they would have used an adjective—like “identical” or “equivalent”—to modify the noun “right to terminate.”

The interpretation of this precise language is not a novel issue. In *Regency Realty Group, Inc. v. Michaels Stores, Inc.*, No. 12-10594, 2012 WL 954639 (E.D. Mich. March 6, 2012), the district court considered a termination clause in a lease virtually identical to the one at issue here (the only difference being that, there, Michaels’ right to terminate vested after 6 months of non-satisfaction, and the landlord’s right expired at the end of 12 months). *Id.* at \*2.<sup>2</sup> Like here, the parties disputed whether the Co-Tenancy Requirement’s termination clauses gave both the landlord and Michaels a continuing right to terminate. Also like here, the landlord argued that the two termination clauses must be harmonized and “the term ‘likewise’ [had] the effect of incorporating the phrase ‘and for so long as nonsatisfaction shall continue’ from the previous passage.” *Id.* at \*5.

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<sup>2</sup> The United States District Court for the Eastern District of Michigan does not prohibit citation to unpublished decisions and, thus, its citation here is also proper. *See* GR 14.1(b). A copy of the *Regency* decision is attached as an Appendix.

The district court rejected the landlord's argument, and concluded that the Lease "grants Landlord a onetime option to terminate":

The Lease plainly and unambiguously grants Tenant an ongoing and continuing right to terminate ("and for so long as such non-satisfaction shall continue ..."). Neither party disputes this. The fact the provision granting Landlord a right to terminate does not include this same language is determinative. Regency and Michaels are both sophisticated parties that have presumably negotiated and entered into numerous commercial leases. ... The fact that the parties used language granting a continuing option in Michaels' termination provision and did not use that same language in Regency's option to terminate is convincing evidence that Regency does not have an ongoing option. The proper inference is that the parties considered whether to grant Landlord an ongoing right to terminate but ultimately decided to limit that right to Tenant.

*Id.* at \*7. The court was also unconvinced by the argument that the use of the word "likewise" in the landlord's termination clause was intended to incorporate the language giving Michaels a continuing right to terminate:

The use of the term likewise indicates that Landlord also has the right terminate; it does not indicate that Landlord's termination right is procedurally identical to Tenant's. After the term likewise, the contract describes the procedures by which Landlord may exercise its termination right. These procedures are materially different from those granted Tenant. Landlord essentially asks the Court to alter the plain language of the contract by changing "at the end of the twelfth month" to "after the end of the twelfth month." The Court, however, must honor the parties' bargain and respect the plain language of the contract as written.

*Id.* All the same is true here. And for all the same reasons, this Court should conclude that the unambiguous language of the Lease manifests the

parties' intent to give RPAI a right to terminate that expired "at" the end of the fourteenth month of non-satisfaction—a right it did not exercise.

2. The Lease Is Commercially Reasonable.

This Court can also reject RPAI's argument that it can ignore the plain meaning of the Lease because it would lead to a "punitive" outcome. Op. Br. at 10, 12 & 13. Courts must interpret contracts to avoid "absurd" results, *Seattle–First Nat'l Bank v. Westlake Park Assocs.*, 42 Wn. App. 269, 274, 711 P.2d 361 (1985), but they cannot re-write an unambiguous contract, especially one between sophisticated commercial parties, simply because subsequent (but foreseeable) events trigger rights that benefit one party more than the other. *Hearst*, 154 Wn.2d at 510-11; *Truck Center Corp. v. General Motors Corp.*, 67 Wn. App. 539, 547, 837 P.2d 631 (1992). The parties plainly contemplated the possibility that RPAI might not satisfy the Co-Tenancy Requirement; if RPAI wanted greater rights in that event, it should have bargained harder. This Court cannot, under the guise of contract interpretation, undo RPAI's perceived "bad bargain."<sup>3</sup>

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<sup>3</sup> This Court must also ignore RPAI's disingenuous suggestion that the trial court's interpretation results in a "windfall" because Michaels' sales increased despite non-satisfaction of the Co-Tenancy Requirement. Op. Br. at 12. That fact is irrelevant to the meaning of the Lease and, as the trial court noted, it does not reflect the increased investment Michaels had to make to bring customers to a shopping center that lacks sufficient anchor tenants, nor does it reflect the greater sales volume Michaels would have enjoyed had the center had such tenants all along. VRP at 25, 30.

In any event, the Lease’s “unbalanced” termination provision is neither “punitive” nor absurd. On the contrary, as the trial court correctly recognized, it was inherently reasonable for the parties to give Michaels greater termination rights than RPAI because satisfaction of the Co-Tenancy Requirement was a critical component of the parties’ bargain—and it is exclusively RPAI’s duty under the Lease, not Michaels’, to satisfy that requirement. VRP at 18:20-24 (“is it unreasonable to think breaching [party’s] rights are a little different [than] the innocent party, ...? Michaels didn’t cause the breach.”). Michaels has a continuing right to terminate because, in the event of non-satisfaction, only RPAI can cure the problem; if RPAI had the same right, it would have far less incentive to do so—effectively gutting the benefit of the Co-Tenancy Requirement.

The trial court’s interpretation avoids that “absurd” result, and is far more commercially reasonable given the parties’ sophistication. The termination clause keeps the onus on RPAI to satisfy the Co-Tenancy Requirement; if it does not do so, Michaels can pay Alternative Rent. RPAI has fourteen months to examine market conditions; if conditions are such that it believes it cannot satisfy the requirement in the future (or that it can strike a better bargain with a new tenant), it has a one-time option to terminate the Lease. If RPAI chooses not to do so, it is not “stuck” with Alternative Rent for the remainder of the lease; it can still find a new

Anchor Tenant, at which point Michaels must resume paying Minimum Rent.<sup>4</sup> Either way, when the option is not exercised, Michaels can adjust its business plans without the continuing threat of sudden termination.

RPAI's interpretation, on the other hand, largely eliminates RPAI's obligation to satisfy the Co-Tenancy Requirement. Rather, in the event of non-satisfaction, both before and after fourteen months, RPAI can simply search for a new tenant willing to pay more than the Alternative Rent. If it is successful, RPAI can threaten termination, at which point Michaels must agree to resume paying the Minimum Rent for the remainder of the lease (with no Anchor Tenant) or the lease will terminate, allowing RPAI to bring on the higher paying tenant. Far from being "balanced," RPAI's interpretation would allow it to benefit from its own failure to satisfy the Co-Tenancy Requirement. Indeed, under its interpretation, although it is not the case here, RPAI would have a perverse incentive to avoid finding a new Anchor Tenant so that it can terminate an unfavorable Lease. Worse yet, it could do so without warning, upon a mere 60-days' notice.

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<sup>4</sup> Here, again, RPAI is wrong when it suggests the Lease gives it a continuing right to terminate because Michaels has the "last word" to avoid termination—*i.e.*, it can agree to reinstate the Minimum Rent. Op. Br. at 9. RPAI has it backwards. The Lease does not give RPAI a continuing termination right because RPAI has the "last word" to avoid termination—*i.e.*, it can satisfy the Co-Tenancy Requirement.

In sum, this Court must reject RPAI's invitation to re-write the unambiguous terms of the Lease in order to avoid absurd consequences. There are no absurd consequences and, if anything, giving effect to the plain meaning of the Lease is far more commercially reasonable than RPAI's strained interpretation. At bottom, the Lease does not grant equivalent termination rights because the Co-Tenancy Requirement does not impose equivalent obligations. It is RPAI's obligation to satisfy that requirement and, thus, only Michaels has a continuing right to terminate in the event RPAI cannot or will not do so. For this reason too, the trial court's grant of summary judgment was proper and must be affirmed.

**C. The Lease's Termination Clause Is Unambiguous And, In Any Event, Ambiguities Must Be Construed Against Termination.**

This Court can also reject RPAI's cursory argument that the Lease's termination provision is ambiguous and, thus, it "should be given the right to introduce evidence concerning the meaning of the language of the language of the Lease." Op. Br. at 7. For all the reasons explained above, RPAI's termination clause is subject to only one reasonable interpretation, and RPAI cannot point to its own strained reading of the word "likewise" to create ambiguity that does not exist. Nor can RPAI get a second bite at the interpretive apple by holding out the hope that a trial will reveal evidence of some unexpressed intent. Michaels moved for

summary judgment after the parties engaged in discovery. CP 195-98, 391. In response to Michaels' motion, RPAI did not proffer any evidence regarding the parties' intent, nor did it move for more time to obtain such evidence. CR 56(e), (f). Simply put, there is no additional evidence.

Regardless, even if RPAI's termination clause was susceptible to two reasonable interpretations, the ambiguity would not save RPAI from summary judgment. It is a well-established common law rule that lease termination provisions, like forfeiture clauses generally, are to be strictly construed, and all ambiguities resolved against termination. *See* 52 C.J.S., *Landlord & Tenant*, § 148; 49 Am. Jur. 2d, *Landlord and Tenant*, § 198 (2d ed.). Washington follows the same rule. *In re Murphy's Estate*, 191 Wash. 180, 71 P.2d 6 (1937); *Kaufman Bros. Const., Inc. v. Olney's Estate*, 29 Wn. App. 296, 628 P.2d 838 (1981); *Stevenson v. Parker*, 25 Wn. App. 639, 608 P.2d 1263 (1980). RPAI's termination clause is not ambiguous, but if it were, application of this rule makes sense here.

For more than three years, beginning in November 2009, RPAI failed to satisfy its obligation to find another Anchor Tenant. But instead of terminating the Lease, as was its right, Michaels remained committed to the Lakewood Towne Center location, paid the Alternative Rent and, perhaps most significantly, exercised its option to extend the Lease for five more years. At no point during that time, even in the face of

Michaels' continued investment, did RPAI inform (or warn) Michaels that it believed the Co-Tenancy Requirement gave it a perpetual right to terminate the Lease upon a mere 60-day notice. Indeed, it wasn't until December 2012, nearly a year after Michaels renewed the Lease, that RPAI first made that startling revelation in the notice of termination itself.

Michaels' reasonable interpretation of the termination clauses does not result in a harsh forfeiture; RPAI's interpretation (if it is reasonable at all) does. As the party who would benefit from such an interpretation, it was incumbent on RPAI—a sophisticated commercial party—to ensure its termination rights were spelled out with unambiguous clarity. *Reeploeg v. Jensen*, 5 Wn. App. 695, 698, 490 P.2d 445 (1971), *rev'd on other grounds*, 81 Wn.2d 541, 503 P.2d 99 (1972) (forfeiture “should not rest in provisions whose meanings are uncertain and obscure and should only be found in plain and clear language whose unequivocal character may render its exercise fair and rightful”). RPAI did not do so, and it cannot now seek to profit from an ambiguity it created. The rules of construction and fairness dictate that ambiguity be construed in Michaels' favor. The trial court's grant of summary judgment was proper on this basis as well.

**D. Michaels Is Entitled To Its Attorneys' Fees On Appeal.**

Under RAP 18.1(a), a prevailing party may recover its reasonable attorneys' fees and expenses on appeal if permitted by applicable law.

Applicable law can include contractual fees provisions in commercial leases. See *City of Puyallup v. Hogan*, 168 Wn. App. 406, 430, 277 P.3d 49 (2012). Here, Section 14.5 of Exhibit C to the Lease provides:

**Litigation, Court Costs and Attorneys' Fees.** In the event that at any time either Landlord or Tenant institutes any action or proceeding against the other relating to the provisions of this Lease or any default hereunder, the prevailing party in such action or proceeding will be entitled to recover from the other party reasonable and necessary costs and attorneys' fees.

CP 233. The trial court awarded Michaels its attorneys' fee below. CP 405, 407. And if this Court affirms the trial court's judgment, as it should, it should likewise award Michaels its fees and expenses on appeal.<sup>5</sup>

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<sup>5</sup> The opposite is not true in the unlikely event this Court reverses. RAP 18.1(b) requires a party to "devote a section of its opening brief to the request for the fees or expenses." This requirement is mandatory, and RPAI's failure to make such a request in its opening brief waives any entitlement to fees it may have. *Phillips Bldg. Co. v. An*, 81 Wn. App. 696, 705, 915 P.2d 1146 (1996). Nor can this omission be cured by arguing the point in RPAI's reply brief. See RAP 18.1(b); *Prosser Hill Coalition v. County of Spokane*, 176 Wn. App. 280, 293, 309 P.3d 1202 (2013); *Hawkins v. Diel*, 166 Wn. App. 1, 13 n. 2, 269 P.3d 1049 (2011).

**V. CONCLUSION**

The Lease does not give RPAI a continuing right to terminate. There is no ambiguity; nor is there any extrinsic evidence that can change the Lease's plain meaning. The judgment below should be affirmed.

RESPECTFULLY SUBMITTED this 1st day of July, 2014.

LANE POWELL PC

By   
Ryan P. McBride  
*Attorneys for Plaintiff-Respondent Michaels  
Stores, Inc.*

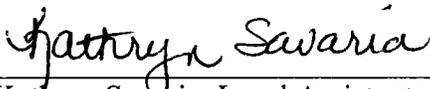
**CERTIFICATE OF SERVICE**

I, Kathryn Savaria, hereby certify under penalty of perjury of the laws of the State of Washington that on July 1, 2014, I caused to be served a copy of the attached document to the following person(s) in the manner indicated below at the following address(es):

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- by Electronic Mail
- by Facsimile Transmission
- by First Class Mail
- by Hand Delivery
- by Overnight Delivery

  
\_\_\_\_\_  
Kathryn Savaria, Legal Assistant

# APPENDIX

Westlaw.

Page 1

Not Reported in F.Supp.2d, 2012 WL 954639 (E.D.Mich.)  
(Cite as: 2012 WL 954639 (E.D.Mich.))

**H**

Only the Westlaw citation is currently available.

United States District Court,  
E.D. Michigan,  
Southern Division.  
REGENCY REALTY GROUP, INC., Plaintiff,  
v.  
MICHAELS STORES, INC., Defendant.

No. 12-10594.  
March 6, 2012.

David M. Blau, Stephon B. Bagne, Kupelian, Ormond & Magy, P.C., Southfield, MI, for Plaintiff.

Brett A. Rendeiro, Richard T. Hewlett, Varnum, Riddering, Novi, MI, for Defendant.

**ORDER (1) DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT; (2) GRANTING DEFENDANT SUMMARY JUDGMENT; AND (3) DENYING DEFENDANT'S MOTION FOR PRELIMINARY INJUNCTION**

VICTORIA A. ROBERTS, District Judge.

**I. INTRODUCTION**

\*1 Regency Realty Group, Inc. ("Landlord" or "Regency") filed this action for a declaration that it has an ongoing right to terminate the Shopping Center Lease ("Lease") it entered into with Michaels Stores, Inc. ("Tenant" or "Michaels"). Michaels asserts a counterclaim against Regency for breach of contract; it seeks injunctive and declaratory relief.

Two motions were pending for hearing on March 5, 2012:(1) Regency's Motion for Summary Judgment (Doc. 5); and (2) Michaels' Motion for Preliminary Injunction (Doc. 8). The parties stipulated to an Order Regarding Lease Termination. Michaels maintains that the Stipulated Order does not moot its request for a preliminary injunction.

Regency's Motion for Summary Judgment is

**DENIED.** Judgment enters as a matter of law for Michaels.

Michaels' Motion for Preliminary Injunction is **DENIED.**

**II. BACKGROUND**

The following facts, taken from the pleadings, do not appear to be in dispute.

Michaels is a large national retailer of arts and crafts materials. Michaels has operated a retail store at the Fenton Village Marketplace in Fenton, Michigan (the "Shopping Center") since September of 2001. Regency owns the Shopping Center.

On January 8, 2008, Regency and Michaels entered into a Lease for 23,828 square feet of retail space at the Shopping Center. The parties executed a Memorandum of Lease that day, which Michaels recorded with the Genesee County Register of Deeds on or about March 14, 2001. The initial term of the Lease was ten years and ended on February 28, 2011, but the Lease contains two five-year options to extend. Michaels exercised the first option to extend, so the Lease, as extended, expires on February 29, 2016.

The Court is asked to interpret two provisions of the Lease: (1) the On-Going CoTenancy Requirement; and (2) the Exclusive Use Provision.

**A. The On-Going Co-Tenancy Requirement**

The On-Going Co-Tenancy Requirement requires Regency to lease the anchor store in the Shopping Center to a regional or national tenant meeting certain requirements. It also sets forth the remedies available to the parties if Regency fails to satisfy the requirement.

One remedy available to Tenant if Landlord fails to maintain an anchor tenant is to pay reduced "Alternative Rent." The pertinent part of the Lease reads:

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16.3 *Failure of Other Required Lessees to Operate.* [ ... ] If at any time after the Rental Commencement Date the On-Going Co-Tenancy Requirement is not satisfied, all Minimum Rent shall be abated until such time as the On-Going Co-Tenancy Requirement is satisfied, and in lieu thereof, Tenant shall pay to Landlord on a monthly basis, thirty (30) days after the end of each calendar month, as "Alternative Rent," an amount equal to the product of (i) the entire amount of Gross Sales ... made upon the Premises during such month or the portion thereof for which Alternative Rent is payable, multiplied by (ii) three percent (3%), but in no event will such Alternative Rent exceed the Minimum Rent which would have been payable for such period in the absence of this provision.

\*2 Regency initially satisfied the On-Going Co-Tenancy Requirement by entering into a lease with Borman's, Inc. to operate a Farmer Jack's Supermarket as anchor tenant. However, around July 5, 2007, Farmer Jack ceased operations at the Shopping Center and Landlord failed to find another anchor tenant. Michaels continuously paid the Alternative Rent from the time Farmer Jack ceased operations to the present. In addition, in a letter dated January 18, 2008, Michaels reserved its right to exercise any other remedies available to it in the Lease.

The Lease provides Tenant a continuing right to terminate if the On-Going Co-Tenancy Requirement is not met for six months or more. It states:

In addition to the rights of Tenant to pay "Alternative Rent," if (a) the nonsatisfaction of the On-Going Co-Tenancy Requirement shall continue for a period of six (6) months beyond the initial failure to meet the On-Going Co-Tenancy Requirement and for so long as such non-satisfaction shall, or (b) the Initial Co-Tenancy Requirement is not satisfied within six (6) months after the date on which the Rental Commencement Date would otherwise have occurred but for the failure to satisfy the Initial

Co-Tenancy Requirement, and for so long as such non-satisfaction shall continue, Tenant shall have the right to terminate this lease by sixty (60) days' written notice delivered to Landlord.

The parties agree that because the On-Going Co-Tenancy Requirement is not satisfied, Michaels has a continuing right to terminate the Lease upon sixty days' notice.

The Lease also provides Landlord a right to terminate the Lease in the event it fails to satisfy the On-Going Co-Tenancy Requirement. It states:

Landlord shall likewise have a right to terminate this Lease at the end of the twelfth (12th) month following the initial nonsatisfaction of the Co-Tenancy Requirement by giving sixty (60) days prior written notice to Tenant of the termination.

The parties dispute the meaning of this provision. Michaels argues that it gives Regency a "one-time option, at a fixed point in time, to terminate the lease in the event it fails to satisfy the On-Going Co-Tenancy Requirement." Regency says its right to terminate is continuing, the same as Michaels'.

#### **B. The Exclusive Use Provision**

The Lease also contains an Exclusive Use Provision which prohibits Regency from leasing any space in the Shopping Center to any of Michaels' commercial competitors. The relevant portion of the Lease states:

16.4.1 *Limitation on Use.* Neither Landlord nor any entity controlled by Landlord will use, lease (or permit the use, leasing or subleasing of) or sell any space in or portion of the Shopping Center or any property contiguous to the Shopping Center ... owned or controlled now or at any time hereafter by Landlord or any affiliate of Landlord, to any "craft store" selling arts and crafts, and arts and crafts supplies, picture frames or picture framing services, framed art, artificial flowers and/or plants, artificial floral and/or plant

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arrangements, or wedding or party goods (except apparel)....

\*3 The Lease grants Tenant various cumulative remedies in the event a violation of the Exclusive Use Provision exists, including reduced rent, the right to terminate the lease, and injunctive relief.

Regency admits that it entered into a new lease with Hobby Lobby, one of Michaels' main competitors, and that it "is barred by the Lease with Tenant from allowing Hobby Lobby to operate in the Shopping Center in competition with Tenant." <sup>FN1</sup> On February 6, 2012, Landlord notified Tenant of its intent to terminate the Lease pursuant to Section 16.3 unless Tenant nullified the termination by agreeing to return to payment of the Minimum Rent. On February 7, 2012, Tenant's counsel informed Landlord that it does not have the right to terminate the Lease.

FN1. The parties stipulated that Michaels would nullify the Termination Notice and return to payment of Minimum Rent pending resolution of the parties' claims, and that Regency would terminate its new lease with Hobby Lobby.

On February 8, 2012, Landlord executed a new lease with Hobby Lobby for the anchor tenant space. The new lease is contingent upon the termination of Michael's Lease; Michaels must vacate the Shopping Center. Landlord has ninety days to notify Hobby Lobby that the lease with Michaels is terminated, and that Michaels vacated. If the contingency is not satisfied within ninety days of February 8, 2012, Hobby Lobby or Regency may terminate the new lease at their discretion.

### III. Procedural History

Regency alleges two causes of action against Michaels: (1) declaration that Landlord has an ongoing right to terminate the lease; and (2) reformation of contract. Regency seeks a declaratory judgment that it acted within its rights under the Lease by sending a termination notice to Michaels. Spe-

cifically, it says that the Lease provides it with an ongoing right to terminate in the event the On-Going Co-Tenancy Requirement is not satisfied, just as it does to Michaels. In the alternative, Regency argues that the parties contemplated that the Lease would provide each an ongoing right to terminate; therefore, the Court should reform its language to conform to the parties' intent.

Michaels asserts counterclaims for (1) breach of contract; (2) declaratory relief; and (3) injunctive relief. Michaels states that Regency breached the Lease by purporting to terminate it even though it was not contractually entitled to do so. Michaels also states that Regency breached the Exclusive Use provision of the Lease by entering into a new lease with one of its main competitors, Hobby Lobby. Michaels seeks a declaratory judgment that Regency does not have an ongoing right to terminate the Lease, and that the Exclusive Use provision of the Lease prevents Regency from entering into a new lease with Hobby Lobby. Lastly, Michaels asks the Court to enjoin Regency from terminating the Lease and from entering into a new lease with Hobby Lobby.

Regency filed a motion for summary judgment on its claim for declaratory relief. It says that if the Court enters summary judgment that the Lease grants it an ongoing termination right, its contract reformation claim will become moot.

### IV. ANALYSIS

\*4 The central question in this litigation is whether Landlord properly exercised its termination rights. If the termination was proper, then Tenant's counterclaims fail.

#### A. Regency's Motion for Summary Judgment

The facts are set forth above and will not be repeated here. Regency supports its motion with the Affidavit of Ryan Shane Ertel, Senior Leasing Agent at Regency. Michaels supports its factual positions in response with the Declaration of Janet S. Morehouse, Senior Director-Real Estate Administration at Michaels.

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The sole issue is whether the Lease provides Regency with a continuing right to terminate the Lease upon the nonsatisfaction of the Co-Tenancy Requirement for twelve months, or rather a one-time option to terminate exercisable only at the end of the twelfth month following initial nonsatisfaction of the Co-Tenancy Requirement.

#### i. Standard of Review

The Court will grant summary judgment in favor of the moving party if that party establishes that “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed.R.Civ.P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). “[W]hen a properly supported motion for summary judgment is made, the adverse party ‘must set forth specific facts showing that there is a genuine issue for trial.’” *Anderson v. Liberty Lobby*, 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Fed.R.Civ.P. 56(e)(2). The Court views the evidence in favor of the non-moving party. *Leahy v. Trans Jones, Inc.*, 996 F.2d 136, 138 (6th Cir.1993). However, the evidence supporting the plaintiff’s position must be more than a mere scintilla; it must be sufficient for the jury to reasonably find in favor of the plaintiff. *Liberty Lobby*, 477 U.S. at 252. “The judge’s inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict—whether there is evidence upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed.” *Id.* (citation and internal quotation marks omitted) (emphasis in original).

#### ii. Parties’ Arguments

At issue is Section 16.3 of the Lease which concerns the parties’ right to terminate the Lease in the event the Co-Tenancy Requirement is not satisfied. The section addressing Landlord’s right to terminate states: “Landlord shall likewise have a right to terminate this Lease at the end of the twelfth (12th) month following the initial nonsatisfaction of

the Co-tenancy Requirement by giving sixty (60) days prior written notice to Tenant of the termination.” This follows immediately after the provision granting Tenant the right to terminate after six months and “for so long as such non-satisfaction shall continue.” *See* p. 3, *supra*.

Both parties state that this contractual language is clear and unambiguous; nevertheless, they dispute its meaning.

\*5 Regency maintains that the provision must be harmonized with the language directly above it granting Tenant an ongoing right to terminate. Regency says that harmonizing the two passages is consistent with one of the cardinal rules of contract interpretation: that the contract must be construed as a whole. Further, Regency says that “[t]here is nothing about this sentence that creates or even implies that the right to terminate is anything other than ongoing.”

Regency says that the use of the term “likewise” in the provision regarding Landlord’s rights is further proof that the passage must be construed consistent with the manner in which a Tenant can exercise its termination right. Regency says that the term “likewise” has the effect of incorporating the phrase “and for so long as such nonsatisfaction shall continue” from the previous passage. Regency concludes that “[b]y using the word ‘likewise’ in the sentence providing Landlord with its termination right, Section 16.3 clearly applies the same procedure to both Tenant’s and Landlord’s termination rights, with the only difference being that Tenant may terminate after six months and Landlord must wait twelve months.”

In addition, Regency argues that if the contract is not interpreted to provide Landlord with an ongoing termination right, two absurd results would follow. First, Regency says that if “likewise” does not incorporate the general procedures identified in the sentence granting Tenant its right, Landlord would be able to terminate even after a new anchor tenant began occupying the space. This result clearly was

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not contemplated by either party. Second, Regency says that the language giving Landlord a termination right “at the end of the twelfth (12th) month” is only workable if that date is a condition precedent that must be met in order for Landlord to exercise the termination right thereafter. Tenant's interpretation that the date is a deadline rather than a condition precedent “would require Landlord to issue its termination notice on the exact, precise, single day that reflected the ‘end of the twelfth (12th) month following the initial unsatisfaction of the Co-Tenancy Requirement.’” Regency says Tenant's interpretation is only workable if the contract sets forth Landlord's termination rights with great specificity. Regency says it fails to do so; it doesn't specify the date that constitutes the end of the twelfth month. Therefore, Regency says Michaels' interpretation is absurd.

In short, Regency says that “likewise” cannot be read out of the sentence because it would violate the principle of statutory construction requiring every word to be assigned meaning. In addition, likewise means that the general procedures for exercising the termination right identified in the sentence granting Tenant its right are incorporated into the sentence granting Landlord its right. It follows that Landlord also has an ongoing right to terminate, exercisable after twelve months rather than six.

\*6 Tenant, on the other hand, says that the plain language of the contract gives Landlord a one-time option to terminate exercisable at the end of the twelfth month of non-satisfaction of the Co-Tenancy Requirement. Landlord did not exercise its option to terminate at that time; it cannot do so now.

Tenant says that the fact that the parties used language granting tenant an ongoing right to terminate (“and for so long as such non-satisfaction shall continue”) but did not use the same language with respect to Landlord's right to terminate is dispositive. It shows that the parties knew how to grant a continuing option but chose not to do so with respect to Landlord. Tenant says that Landlord

is really asking the Court to impermissibly alter the plain language of the contract by replacing “at the end of the twelfth month” with “at any time after the twelfth month.” The use of the word “at” rather than “after” was a deliberate decision that the Court must respect. Lastly, Tenant says Landlord's argument that it is absurd to require a party to terminate on a particular date is a red-herring because there is nothing extraordinary about requiring a party to do something on a precise date. For example, a lease has a particular start and end date; rent is due on a particular date; etc.

Michaels says there is no genuine issue of material fact with respect to the claims set forth in Regency's Complaint, and that judgment should enter in Michaels' favor on those claims as a matter of law.

### iii. Discussion

Regency properly supported its motion for summary judgment with a sworn affidavit. *See* Fed.R.Civ.P. 56(c)(1). The materials Michaels submitted in response do not contradict Regency's factual allegations. *See* Fed.R.Civ.P. 56(e)(2). Both parties agree that there is no genuine issue of material fact regarding Regency's claims and that the Court may enter judgment as a matter of law.

The Court finds that there is no genuine issue as to any material fact. It is undisputed that the lease between Regency and Michaels contains the On-Going CoTenancy Requirement, and that the Requirement has not been satisfied since July 2007. It is also undisputed that Regency attempted to exercise its termination rights on February 8, 2012. All that remains is for the Court to interpret the Lease and determine if Regency's termination of Michaels was proper.

The Court begins by reiterating the guiding principles of contract interpretation under Michigan law. The proper interpretation of a contract is a question of law in Michigan. *Coates v. Bastian Bros., Inc.*, 276 Mich.App. 498, 741 N.W.2d 539, 543 (Mich.Ct.App.2007). “The primary goal in the

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construction or interpretation of any contract is to honor the intent of the parties.” *Rasheed v. Chrysler Corp.*, 445 Mich. 109, 127 n. 28, 517 N.W.2d 19 (1994). The Court must limit its analysis to the words within the four corners of the document; it “does not have the right to make a different contract for the parties or to look to extrinsic testimony to determine their intent when the words used by them are clear and unambiguous and have a definite meaning.” *UAW–GM Human Resource Center v. KSL Recreation Corp.*, 228 Mich.App. 486, 579 N.W.2d 411, 414 (Mich.Ct.App.1998) (internal citation omitted). “Contractual language is construed according to its plain and ordinary meaning, and technical or constrained constructions are to be avoided.” *Dillon v. DeNooyer Chevrolet Geo*, 217 Mich.App. 163, 550 N.W.2d 846 (Mich.Ct.App.1996). Courts may not impose ambiguity on clear contract language. *Grosse Pointe Park v. Michigan Muni. Liability & . Prop. Pool*, 473 Mich. 188, 198, 702 N.W.2d 106 (2005). Only when contractual language is ambiguous does its meaning become a question of fact. *Coates*, 741 N.W.2d at 543.

\*7 The parties agree that the plain language of the Lease provision granting Landlord the right to terminate is unambiguous and that it must be given its plain and ordinary meaning. However, they dispute whether Regency's purported termination of Michaels on February 8, 2012, violates the clause. But, “[t]he fact that the parties dispute the meaning of a [contract] does not, in itself, establish an ambiguity.” *Gortney v. Norfolk & Western Ry. Co.*, 216 Mich.App. 535, 549 N.W.2d 612, 615 (Mich.Ct.App.1996) (internal citations omitted). Whether a contract is ambiguous is a question of law for the court. *Port Huron Ed. Ass'n v. Port Huron Area School Dist.*, 452 Mich. 309, 323, 550 N.W.2d 228 (1996)

The Court agrees that the provision of the Lease granting Landlord's termination right is unambiguous. Further, the Court finds that the provision grants Landlord a onetime option to terminate

Tenant at the end of the twelfth month following nonsatisfaction of the Co–Tenancy Requirement. Landlord did not timely exercise its right to terminate; it is barred from doing so now.

The Lease plainly and unambiguously grants Tenant an ongoing and continuing right to terminate (“and for so long as such non-satisfaction shall continue ...”). Neither party disputes this. The fact that the provision granting Landlord a right to terminate does not include this same language is determinative. Regency and Michaels are both sophisticated parties that have presumably negotiated and entered into numerous commercial leases. Presumably, both parties acted upon the advice of counsel in drafting, negotiating, and entering into the Lease. The fact that the parties used language granting a continuing option in Michael's termination provision and did not use that same language in Regency's option to terminate is convincing evidence that Regency does not have an ongoing option. The proper inference is that the parties considered whether to grant Landlord an ongoing right to terminate but ultimately decided to limit that right to Tenant.

The Court is unconvinced by Plaintiff's argument that the use of the term “likewise” in the provision granting Landlord's termination right incorporates the language which provides Tenant with an ongoing and continuing right to terminate. The use of the term likewise indicates that Landlord also has the right to terminate; it does not indicate that Landlord's termination right is procedurally identical to Tenant's. After the term likewise, the contract describes the procedures by which Landlord may exercise its termination right. These procedures are materially different from those granted Tenant. Landlord essentially asks the Court to alter the plain language of the contract by changing “at the end of the twelfth month” to “after the end of the twelfth month.” The Court, however must honor the parties' bargain and respect the plain language of the contract as written. *See Nextep Systems, Inc. v. OTG Management, Inc.*, No. 10–14473, 2011 WL

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3918871 at \*11 (E.D.Mich. Sept. 7, 2011) (Roberts, J.) (“The Court may not alter the plain language of the [contract] by reading requirements into it that are not there.”).

\*8 Nor does the Court agree with Landlord that this reading of its termination provision leads to absurd results. First, there is nothing extraordinary about requiring the parties to do something on a precise date. The fact that the Lease does not set forth a specific date upon which Landlord must exercise its termination right is obviously because such date depends upon the date when the On-Going Co-Tenancy Requirement ceases to be satisfied. Regency's strained hypothetical about what would happen if it attempted to terminate the lease at the end of the twelfth month even though the co-tenancy clause had been satisfied in the meantime is unconvincing. Assuming such a scenario would ever occur, Tenant could simply issue a letter within 30-days recognizing that it had returned to paying Minimum rent and nullifying the termination notice, all as contemplated by the Lease.

#### iv. Conclusion

The Lease unambiguously grants Landlord a one-time option to terminate the Lease exercisable at the end of the twelfth month of non-satisfaction of the Co-Tenancy Requirement. Landlord did not timely exercise its right to terminate. Its attempt to do so on February 8, 2012 is invalid. Landlord's motion for summary judgment is denied. Judgment on the termination issue enters for Tenant as a matter of law. See Fed.R.Civ.P. 56(f); *Excel Energy Inc. v. Cannelton Sales Co.*, 246 Fed.Appx. 953, 960-61 (6th Cir.2007).

#### B. Michaels' Motion for Preliminary Injunction

A preliminary injunction is an extraordinary remedy designed “to preserve the relative positions of the parties until a trial on the merits can be held.” *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981). When presented with a motion for preliminary injunction, a court addresses four factors: (1) the likelihood of

success on the merits; (2) irreparable harm that could result if the injunction is not issued; (3) the impact on the public interest; and (4) the possibility of substantial harm to others. *Basicimputer Corp. v. Scott*, 973 F.2d 507, 511 (6th Cir.1992). The party moving for a preliminary bears the burden to affirmatively demonstrate that it is entitled to injunctive relief. The burden “is much more stringent than the proof required to survive a motion for summary judgment.” *Nextep Systems, Inc. v. OTG Management, Inc.*, No. 10-14473, 2011 WL 3918871 (E.D.Mich. Sept.7, 2011).

Michaels has not met its burden of proof; it cannot show that irreparable harm could result if the injunction is not issued. “Absence of irreparable injury must end this court's inquiry.” *Vander Vreken v. Am. Dairy Queen Corp.*, 261 F.Supp.2d 821, 824 (E.D.Mich.2003). The parties entered into a Stipulated Order in which Regency agreed to terminate its new lease with Hobby Lobby and Michaels agreed to return to paying the Minimum Rent pending a determination of the parties' rights under the Lease. In addition, Regency has repeatedly maintained throughout this litigation that under no scenario would Michaels and Hobby Lobby occupy the Shopping Center simultaneously.

\*9 The Court finds that there is no present danger that Hobby Lobby will occupy the shopping center in violation of the Exclusive Use provision of the Lease. In addition, since the Court found that Regency did not have a right to terminate the Lease with Michaels, there is no present danger that Michaels will be evicted from the Shopping Center. Lastly, the parties agreed to enter into a protective order to prevent the disclosure of confidential financial information. Thus, the present posture of this case does not present a risk of irreparable injury to Michaels; if circumstances change, Michaels can return to Court to seek a preliminary injunction.

#### V. CONCLUSION

The Lease does not allow Regency to terminate Michaels' tenancy. Regency's motion for summary judgment is **DENIED**. Judgment enters on Re-

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(Cite as: 2012 WL 954639 (E.D.Mich.))

gency's termination claim as a matter of law for Michaels. Michaels' Motion for Preliminary Injunction is **DENIED**.

This case will proceed on Regency's claim for reformation, and Michaels' counterclaims.

**IT IS ORDERED.**

E.D.Mich.,2012.  
Regency Realty Group, Inc. v. Michaels Stores, Inc.  
Not Reported in F.Supp.2d, 2012 WL 954639  
(E.D.Mich.)

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## LANE POWELL PC

**July 01, 2014 - 2:35 PM**

### Transmittal Letter

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Court of Appeals Case Number: 46071-8

**Is this a Personal Restraint Petition?** Yes  No

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Statement of Additional Authorities

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Objection to Cost Bill

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Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

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