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Court of Appeals of Georgia.
COVINGTON SQUARE ASSOCIATES, LLC
v.
INGLES MARKETS, INC.
No. A07A0332.

Jan. 12, 2007.
Reconsideration denied Jan. 26, 2007.
Certiorari Denied April 24, 2007.

Background: Shopping center landlord brought breach of contract action against tenant for tenant's failure to pay security guard costs. The State Court, DeKalb County, Panos, J., granted tenant summary judgment. Landlord appealed.

Holdings: The Court of Appeals, Blackburn, P.J., held that:
(1) under lease, tenant was not responsible for security guard costs, and
(2) trial court was entitled to grant summary judgment, even though landlord's motion to compel discovery was still pending.

Affirmed.

West Headnotes

[1] Contracts 95 ⚿176(1)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k176 Questions for Jury
95k176(1) k. In General. Most Cited Cases
Construction of a contract is a matter of law for the court.

[2] Contracts 95 ⚿143(1)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k143 Application to Contracts in General
95k143(1) k. In General. Most Cited Cases
In a breach of contract action, the trial court must first decide whether the language is clear and unambiguous; if it is, no construction is required, and the court simply enforces the contract according to its clear terms.

[3] Contracts 95 ⚿143(2)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k143 Application to Contracts in General
95k143(2) k. Existence of Ambiguity. Most Cited Cases
If the contract is ambiguous in some respect, the court must apply the rules of contract construction to resolve the ambiguity.

[4] Contracts 95 ⚿176(2)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k176 Questions for Jury
95k176(2) k. Ambiguity in General. Most Cited Cases
If a contract ambiguity remains after applying the rules of construction, the issue of what the ambiguous language means and what the parties intended must be resolved by a jury.

[5] Contracts 95 ⚿176(2)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k176 Questions for Jury
95k176(2) k. Ambiguity in General. Most Cited Cases

The existence or nonexistence of a contract ambiguity is a question of law for the court.

[6] Contracts 95 ⚿176(2)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k176 Questions for Jury
95k176(2) k. Ambiguity in General. Most Cited Cases

If the court determines that a contract ambiguity exists, a jury question does not automatically arise, but rather the court must first attempt to resolve the ambiguity by applying the rules of construction. West's Ga.Code Ann. § 13-2-2.

[7] Contracts 95 ⚿147(3)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k147 Intention of Parties
95k147(3) k. Construing Whole Contract Together. Most Cited Cases

The court seeks to determine the intent of the parties to a contract within the terms of the entire agreement.

[8] Landlord and Tenant 233 ⚿148(2)

233 Landlord and Tenant
233VII Premises, and Enjoyment and Use Thereof
233VII(C) Incumbrances, Taxes, and Assessments
233k148 Covenants and Agreements as to Taxes and Assessments
233k148(2) k. What Taxes or Assessments Are Within the Covenant. Most Cited Cases

The list of common area costs under shopping center lease agreement did not include the cost of security guards, and thus, tenant was not responsible for such costs, where security guard costs were omitted from the list of particular items that were included in common area costs.

[9] Appeal and Error 30 ⚿171(1)

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(A) Issues and Questions in Lower Court
30k171 Nature and Theory of Cause
30k171(1) k. In General; Adhering to Theory Pursued Below. Most Cited Cases

Appeal and Error 30 ⚿223

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(B) Objections and Motions, and Rulings Thereon
30k223 k. Judgment. Most Cited Cases

Shopping center landlord's argument that the parties modified lease agreement through their conduct was not properly before the Court of Appeals, where landlord did not raise the argument in the trial court and the trial court did not address it in its summary judgment order.

[10] Judgment 228 ⚿186

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k186 k. Hearing and Determination. Most Cited Cases

Deposition testimony from corporate officer of shopping center tenant would have added nothing of substance to landlord's breach of contract claim, and thus, trial court was entitled to grant summary judgment to tenant, even though landlord's motion to compel discovery was still pending.

[11] Judgment 228 ⚿186

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k186 k. Hearing and Determination. Most Cited Cases

As a general rule, the Court of Appeals does not

condone the grant of summary judgment while a motion to compel discovery is pending, unless it can be determined that the disallowed discovery would add nothing of substance to the party's claim. ****267** Michael A. Kessler, Cumming, for Appellant.

Hartman, Simons, Spielman & Wood, Samuel Robinson Arden, Jill Rhodes Johnson, Atlanta, for Appellee.

BLACKBURN, Presiding Judge.

***307** In this breach of contract claim, Covington Square Associates, LLC ("Covington") appeals the grant of summary judgment to Ingles Markets, Inc. ("Ingles"), contending that (1) the trial court erred in ruling that a lease agreement between Covington and Ingles did not require Ingles to pay a certain portion of security guard costs associated with a shopping center; (2) issues of material fact exist as to whether the parties' conduct effected a mutual departure from the terms of the lease agreement; and (3) the trial court erred in ruling on Ingles's motion without first ruling on Covington's motion to compel discovery. For the reasons that follow, we affirm.

> Summary judgment is proper when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. OCGA § 9-11-56(c). A de novo standard of review applies to an appeal from a grant of summary judgment, and we view the evidence, and all reasonable conclusions and inferences drawn ****268** from it, in the light most favorable to the nonmovant.

Matjoulis v. Integon Gen. Ins. Corp.[FN1]

> FN1. *Matjoulis v. Integon Gen. Ins. Corp.*, 226 Ga.App. 459(1), 486 S.E.2d 684 (1997).

The undisputed record shows that from 1995 to 2004, Covington leased certain property to Ingles in a shopping center, where Ingles operated a grocery store. During that period, Covington hired a ***308** security guard for the shopping center and billed Ingles periodically for a portion of the costs, based on an amount proportional to the square footage leased by Ingles, which was the largest tenant. Ingles paid part of the billed amounts, based on an equal division among tenants, and disputed the remaining amounts billed by Covington. When Covington sold the shopping center in 2004, it sought to collect the unpaid portions of the security guard costs it billed to Ingles. When Ingles refused to pay, Covington sued Ingles for breach of contract seeking damages for unpaid rents under the lease. Ingles moved for summary judgment, contending that the lease did not require it to pay security guard costs calculated as a proportional amount, and the trial court granted the motion, giving rise to this appeal.

[1][2][3][4][5][6] 1. Covington contends that the lease agreement between Ingles and Covington allowed it to charge Ingles for security on a pro rata, proportional basis. We disagree.

> [T]he construction of contracts involves three steps. At least initially, construction is a matter of law for the court. First, the trial court must decide whether the language is clear and unambiguous. If it is, [no construction is required, and] the court simply enforces the contract according to its clear terms.... Next, if the contract is ambiguous in some respect, the court must apply the rules of contract construction to resolve the ambiguity. Finally, if the ambiguity remains after applying the rules of construction, the issue of what the ambiguous language means and what the parties intended must be resolved by a jury. The existence or nonexistence of an ambiguity is a question of law for the court. If the court determines that an ambiguity exists, however, a jury question does not automatically arise, but rather the court must first attempt to resolve the ambiguity by applying the rules of construction in OCGA § 13-2-2.

(Citations omitted.) *Woody's Steaks, LLC v. Pastoria.*[FN2]

FN2. *Woody's Steaks, LLC v. Pastoria*, 261 Ga.App. 815, 817, 584 S.E.2d 41 (2003).

Here, the relevant provisions of the lease are as follows:

> 6.3 *Maintenance.* Landlord [Covington] shall maintain, in keeping with the highest standards of shopping center practice, the Common Areas in clean condition and good repair, including but not limited to: (i) maintaining all signs, landscaped areas, and parking areas and access roads ...; (ii) ***309** adequately illuminating the parking areas ...; and (iii) providing adequate security lighting and fire protection for the Shopping Center as required by applicable code or ordinance.
>
> 6.4 *Tenant's Contribution.* Tenant [Ingles] shall pay to the Landlord, as additional rent during the term hereof, Tenant's proportionate share of Landlord's costs of operating the Shopping Center and maintaining the Common Areas (the "Common Area Costs") during the term hereof. Tenant's proportionate share shall be calculated [according to the proportion of the total square footage leased by Tenant, based on a 32,000 square feet total].... As used herein, " *Common Area Costs* " shall mean the costs and expenses incurred by Landlord in the operation and maintenance of the Shopping Center and the Common Areas, *and shall include* repairs to the parking areas or other Common Areas, lighting, removal of snow and ice, trash, rubbish and other refuse, general comprehensive liability insurance covering the Common Areas; fire, casualty and extended coverage on the Premises and the Shopping Center ...; and the cost of leasing or the depreciation on any equipment used to implement the foregoing maintenance, *but shall not include:* any Shopping Center administrative or management ****269** fees or the like; the cost of any item for which Landlord is reimbursed by insurance or otherwise; the cost of any additions to the Common Areas pursuant to an expansion of the Shopping Center's leasable square footage; the cost of any alterations ... and other items ... properly classified as capital expenditures or which are made in order to prepare space for occupancy by a new tenant; the cost of any initial installations ...; legal, accounting and other professional fees; interest or amortization payments ...; leasing commissions, advertising expenses and other costs incurred in leasing or attempting to lease any portion of the Shopping Center; the cost of any services performed specifically for certain tenants of the Shopping Center; the cost of correcting defects in the construction of the buildings ...; reserves for ... repair ...; the cost of Landlord's membership [s] ...; and any political or charitable contributions.

(Emphasis supplied.)

At the outset, we note that Covington seeks recovery of a specific amount, defined in Section 6.4 as "Common Area Costs," calculated by the particular formula outlined in that section. It is undisputed ***310** that Ingles has paid some amount each year for the security guard charges. Therefore, Ingles's debt, as calculated under the "Common Area Costs" formula, exists, if at all, only as a function of the lease agreement.

Accordingly, the relevant question is whether security guard costs are contemplated by the term "Common Area Costs," as defined in Section 6.4. In defining the term "Common Area Costs," the lease does not list security guard costs after the phrase "shall include," nor does the lease list them after the phrase "shall not include." In light of this lack of clarity, we apply the rules of contract construction to discern the meaning of the provision. See *Woody's Steaks, LLC v. Pastoria*, supra, 261 Ga.App. at 817, 584 S.E.2d 41.

[7][8] "The cardinal rule of construction is to ascertain the intention of the parties. OCGA § 13-2-3." (Punctuation omitted.) *Krogh v. Pargar, LLC.*[FN3] "The court seeks to determine the intent of the parties within the terms of the entire agreement." *In re Estate of Sims.*[FN4] Of particular importance here is the phrase " 'Common Area Costs' shall

mean the costs and expenses incurred by Landlord in the operation and maintenance of the Shopping Center and the Common Areas, *and shall include* repairs [and other listed items].” (Emphasis supplied.) Covington argues that the phrase “and shall include” is not limiting, and the omission of security guard costs from the list of particular items that shall be included is not dispositive. Ingles argues, and the trial court held, that the maxim “[e]xpressio unius est exclusio alterius[, t]he express mention of one thing implies the exclusion of another,” (punctuation omitted) *Krogh v. Pargar, LLC,* supra, 277 Ga.App. at 39(2), 625 S.E.2d 435, applies here. Such application would mean that security guard costs were not included in the costs to be calculated by the “Common Area Costs” formula, because they were not enumerated in the list of items that “shall include.” This interpretation is arguably tenuous in light of the fact that, in the same sentence, a separate list of excluded items is given. However, looking to similar language in Section 6.3, addressing maintenance, the lease uses the following terminology: “Landlord shall maintain ... the Common Areas in clean condition and good repair, *including but not limited to:* (i) maintaining all signs, landscaped areas, [etc.]” The use of the phrase “but not limited to” in Section 6.3, and its absence in Section 6.4, implies a different operation of the word “include” as used in Section 6.4, in that it may be read in that context to be a limiting term, similar to “shall consist of.” See *Berryhill v. Ga. Community Support, etc.*[FN5] (“where a general term is ***311** followed by the word ‘including,’ which is itself followed by specific terms, the intent may be one of limitation”) (punctuation omitted). ****270** If the parties had intended the term “shall include” to mean otherwise, they could have qualified it as they did “including” in Section 6.3.

FN3. *Krogh v. Pargar, LLC,* 277 Ga.App. 35, 38(2), 625 S.E.2d 435 (2005).

FN4. *In re Estate of Sims,* 259 Ga.App. 786, 790(1), 578 S.E.2d 498 (2003).

FN5. *Berryhill v. Ga. Community Support, etc.,* 281 Ga. 439, 441, 638 S.E.2d 278, 281 (2006).

Therefore, reading the lease in its entirety and harmonizing its terminology, we conclude that the list of costs to be calculated under the Common Area Costs formula does not include security guard costs. The trial court correctly ruled that Ingles was not required to pay for security guard costs according to the Common Area Costs formula in the lease.

[9] 2. Covington contends that material issues of fact exist as to whether the parties modified the contract through their conduct. However, Covington did not raise this argument before the trial court, nor did the trial court address it in its order, so the issue is not properly before this Court. See *West v. Austin.*[FN6] Covington points to a portion of the transcript from oral argument where the trial court briefly questions whether an implied contract existed. However, Covington's complaint does not seek recovery under an implied contract theory; it merely states that Covington “seeks to recover damages for breach of contract for rent due under a commercial lease.” See *Hendon Properties v. Cinema Dev.*[FN7] Nor did counsel for Covington raise and argue an implied contract theory before the trial court. This being the case, we will not consider such an argument here. Moreover, although mutual departure is generally a jury question, see *Bridgeboro Lime, etc. Co. v. Hewitt Contracting Co.,*[FN8] we note that here, the trial court correctly ruled that Ingles was authorized to refuse to pay for the security guard charges calculated by Covington in accordance with the formula in the lease, and it is undisputed that it did so refuse. Therefore, there is no factual issue as to a mutual departure from the contract terms, as Ingles consistently denied that security guard costs were to be billed as a Common Area Cost.[FN9] See *Guideone Life Ins. Co. v. Ward*[FN10] (the departure “must be *mutual* between the parties and intended, and must be such as, in law, to make practically a new agreement”) (punctuation omitted; emphasis supplied).

FN6. *West v. Austin,* 274 Ga.App. 729,

730, 618 S.E.2d 662 (2005).

FN7. *Hendon Properties v. Cinema Dev.*, 275 Ga.App. 434, 439(2), 620 S.E.2d 644 (2005).

FN8. *Bridgeboro Lime, etc., Co. v. Hewitt Contracting Co.*, 221 Ga. 552, 555(2), 146 S.E.2d 305 (1965).

FN9. Ingles, apparently inadvertently, paid as billed one year, but it has filed a counterclaim for that payment, and in prior and subsequent years Ingles disputed the amount it was charged for security guard costs. We do not deem this to be a pattern sufficient to evidence a mutual departure. See *Prudential Ins. Co. v. Nessmith*, 174 Ga.App. 39, 40, 329 S.E.2d 249 (1985).

FN10. *Guideone Life Ins. Co. v. Ward*, 275 Ga.App. 1, 3(1)(a), 619 S.E.2d 723 (2005).

[10] ***312** 3. Covington also contends that the trial court erred in ruling on Ingles's motion for summary judgment while Covington's motion to compel discovery was pending. We disagree.

After the close of discovery, Covington sought and obtained a subpoena to depose Robert Ingle, an officer of Ingles. Prior to the trial court's order on its motion for summary judgment, Ingles moved to quash the subpoena and Covington moved to compel discovery. In its order granting summary judgment, the trial court ruled that the motions were moot.

[11] "As a general rule, this Court does not condone the grant of summary judgment while a motion to compel discovery is pending, unless it can be determined that the disallowed discovery would add nothing of substance to the party's claim." (Punctuation omitted.) *Parks v. Hyundai Motor America.* FN11 Here, Covington contends that Robert Ingle's deposition was necessary in that he would have testified as to why Ingles did not pay for security guard costs as billed by Covington. However, as Covington's claim is based on a breach of contract, which was susceptible to interpretation by the Court as a matter of law, Robert Ingle's testimony can add nothing of substance to ****271** Covington's claim. Accordingly, we discern no error.

FN11. *Parks v. Hyundai Motor America*, 258 Ga.App. 876, 877(1), 575 S.E.2d 673 (2002).

Judgment affirmed.

RUFFIN and BERNES, JJ., concur.
Ga.App.,2007.
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