

STATE OF MICHIGAN
COURT OF APPEALS

THOMAS A. DUKE COMPANY,

Plaintiff-Appellant,

v

TIMOTHY C. PAUL a/k/a TIM PAUL,

Defendant-Appellee.

UNPUBLISHED

April 15, 1997

No. 194832

Oakland Circuit Court

LC No. 95-499940-CK

Before: Holbrook, Jr., P.J., and Fitzgerald and Smolenski, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition. We reverse.

Plaintiff, a real estate broker, and defendant entered into an agreement pursuant to which defendant provided services as an independent contractor selling real estate for plaintiff. The agreement provided that the contract was terminable at will by either party upon written notice to the other party. The parties agreed that defendant would be compensated by receiving a share of the commissions generated by his sales. Plaintiff also agreed to pay defendant \$3,500 per month as a "draw" against his share of commissions generated by future sales. Eight months after entering into the contract, plaintiff decided to end its association with defendant and provided him with written notice that it was terminating the contract. At that point, plaintiff alleged that it was owed approximately \$22,000 by defendant, which amount represented the difference between the monies advanced to defendant in monthly draws and the amount of commissions earned by defendant. Defendant refused to remit the sum to plaintiff, and plaintiff filed suit.

Defendant moved for summary disposition, claiming that he was not required to repay plaintiff for the draws because they were to be taken out of earned commissions. Defendant argued that the terms of the agreement clearly provided that termination of the contract extinguished all liabilities between himself and plaintiff. Plaintiff argued that although earned commissions were used to offset monthly draws, the draws were defined as loans which were required to be repaid. Plaintiff also filed its own motion for summary disposition, claiming that defendant had not presented a valid defense to its

claim, and that no genuine issues of material fact remained. The trial court agreed with defendant's interpretation of the contract and granted his motion for summary disposition pursuant to MCR 2.116(C)(10).

Plaintiff argues that the trial court improperly interpreted the contract. We agree. Where the language of a contract is "clear and unambiguous, its meaning is a question of law." *Port Huron Educ Ass'n v Port Huron Area School Dist*, 452 Mich 309, 323; 550 NW2d 228 (1996). However, if the contract's language is "unclear or susceptible to multiple meanings, interpretation becomes a question of fact." *Id.* A contract is also considered ambiguous if its language is "inconsistent on its face." *Petovello v Murray*, 139 Mich App 639, 642; 362 NW2d 857 (1984). Whether the language of a contract is ambiguous is a question of law. *Port Huron Educ Ass'n, supra*. Questions of law are reviewed de novo by this Court. *In re Austin Estate*, 218 Mich App 72, 74; 553 NW2d 632 (1996). The language of a contract "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, 166; 550 NW2d 846 (1996).

The trial court relied on the following provision of the parties' agreement:

11. This contract and the association created hereby may be terminated by either party hereto at any time, and without any liability, upon written notice given to the other; but the rights of the parties to any commission which accrued prior to said notice shall not be divested by termination of this contract. [Emphasis added.]

Plaintiff asserts that this provision should be interpreted to mean that the parties waive liability for breach of contract claims arising out of the termination of the association between the parties, but that this waiver of liability is not intended to disturb any "vested" rights of the parties, including its right to recover outstanding monthly draws it advanced defendant. We find that plaintiff's suggested interpretation is not supported by the plain language used in this provision. The release of liability is not limited to any particular claim. Moreover, the narrow exception from the release only addresses the rights of the parties to certain commissions. Therefore, we agree with the trial court that this provision should be interpreted to mean that defendant's liability to plaintiff was extinguished when the contract was terminated. However, we do not agree with the trial court's conclusion that such an interpretation supports a grant of summary disposition.

We find that, as a whole, the contract is ambiguous on the issue of whether the monthly draws must be repaid after the contract is terminated. According to the agreement, draws are considered loans to salespersons:

6. The commissions and fees for services rendered in the sale, rental, trade or leasing of real estate shall be those as established by Broker from time to time, and shall be the sole remuneration for the services performed pursuant to this contract. Any draws taken by the salesperson against future commissions are in fact a loan to the salesperson and due on demand. [Emphasis added.]

The addendum to the agreement also addresses monthly draws:

Draws are defined as advances against future commissions and are taken voluntarily by the salesperson. All draws advanced remain due and payable by the Salesperson to the Broker on demand, provided, however, if the Thomas A. Duke Company shall fail to exist upon the voluntary action of the Broker, then all draws/advances shall be deemed fully earned by the Salesperson and not repayable to the Broker.

The addendum indicates that the only situation in which a salesperson would not be obligated to repay outstanding monthly draws is if the company voluntarily ceased its business operations. There is no indication that termination of the contract would relieve a salesperson of this obligation. In fact, the following language in the addendum supports the opposite conclusion:

Draw Conditions

* * *

5. Should the Independent Contractor leave the Thomas A. Duke Company within the first 90 days, due to lack of opportunity, the Thomas A. Duke Company will forgive the first 3 draws owed.

By stating a specific condition under which the company would “forgive” draws, and further stating that only the first three draws would be subject to such forgiveness, this clause suggests that repayment would be required if a salesperson left the company for a reason other than “lack of opportunity” or had more than three draws outstanding.

We find that these provisions, which specifically address draws, are in conflict with the provision upon which the trial court relied. Therefore, the agreement is ambiguous on the issue of whether salespersons must repay outstanding monthly draws after written notice of termination is provided. The interpretation of an ambiguous contract is a question of fact. *Port Huron Educ Ass’n, supra*. Accordingly, the trial court’s grant of summary disposition was inappropriate.

Reversed.

/s/ Donald E. Holbrook, Jr.
/s/ E. Thomas Fitzgerald
/s/ Michael R. Smolenski