STATE OF MICHIGAN

COURT OF APPEALS

RELLEUM INC,

Plaintiff-Appellee,

v

TALON DEVELOPMENT GROUP,

Defendant-Appellant.

UNPUBLISHED
September 4, 1998

No. 202394
St Clair Circuit Court
LC No. 96-003540 CE

Before: Markey, P.J., and Sawyer, and Neff, JJ.

PER CURIAM.

Defendant Talon Development Group appeals by right the trial court's grant of summary disposition in favor of plaintiff. We affirm in part, reverse in part, and remand for further proceedings.

First, defendant claims that the trial court improperly concluded that there was no genuine issue of material fact as to whether the parties entered into a binding agreement to sell the property at issue. We believe that a reasonable juror could conclude that the parties entered into a binding agreement; therefore, summary disposition was improper.

A contract to make a contract is not per se unenforceable; it may be just as valid as any other contract. *Opdyke Investment Co v Norris Grain Co*, 413 Mich 354, 359; 320 NW2d 836 (1982). However, mere discussions and negotiation cannot substitute for the formal requirements of a contract. *Kamalnath v Mercy Memorial Hospital Corp*, 194 Mich App 543, 549; 487 NW2d 499 (1992). Whether the parties had a "meeting of the minds" is judged by an objective standard, not subjective states of mind. *Id*. "Whether the parties intend to be bound only by a formally written and executed final document is a question of fact, not a question of law. In most cases, the question is properly left to the jury." *Opdyke*, *supra* at 360.

To be enforceable, a contract to enter into a future contract must specify all its material terms and leave none to be agreed upon through future negotiations. *Heritage Broadcasting Co v Wilson Communications Inc*, 170 Mich App 812, 819; 428 NW2d 784 (1988). The "material terms which must be established before an agreement becomes enforceable are generally the

identification of the parties, the property, and consideration." *Kojaian v Ernst*, 177 Mich App 727, 731; 442 NW2d 286 (1989). When other terms are missing, courts will presume reasonable terms unless the parties express a contrary intent. *Id*.

Giving defendant the benefit of the doubt and being liberal in finding a question of fact, a reasonable interpretation of the evidence is that the March 20, 1996 correspondence is the culmination of negotiation on the material terms of purchase. The fact the correspondence from plaintiff states that a purchase agreement *will be* drafted and executed creates a reasonable inference that the parties agreed to agree, or contracted to enter into another contract, i.e., a purchase agreement. In other words, a reasonable juror could conclude that the parties had agreed on the material terms, and a subsequent purchase agreement would formalize the agreement. From the March 20 correspondence, it is clear that the parties are Relleum and Talon, that the property is Relleum's parcel of land on M-25 consisting of 28.87 acres of commercial property and .96 acres of non-regulated wetland, and that the consideration is $4.5 million cash at closing. According to *Kojaian, supra*, all of the other terms can be implied as "reasonable."

An objective reading of the correspondence could reasonably lead to the conclusion that the parties had a meeting of the minds on the material terms of the transaction and had decided to enter into a final purchase agreement. All of the other statements and conduct of the parties to the contrary simply create questions of fact. In our opinion, there are simply too many conflicting indications of intent to summarily dismiss this case. Questions of intent must usually be resolved by the jury. The intent issue here is not so clear that it should fall into the minority of cases that need not be left to a jury.

Next, defendant claims that the trial court improperly dismissed its claim for lost profits. The trial court ruled that because there was no way defendant could prove that the planned real estate project would succeed, and because there was no evidence defendant had commitments from tenants, defendant could not, as a matter of law, establish with reasonable certainty that it lost profits. We agree with the trial court.

It is uncertainty as to the fact of damage, not amount of damage that is the relevant consideration: "[W]here it is certain that damage has resulted, mere uncertainty as to the amount will not preclude the right of recovery." *Bonelli v Volkswagen of America Inc*, 166 Mich App 483, 511; 421 NW2d 213 (1988). However, courts should not impose a higher degree of certainty than the particular case allows. *Id*. at 512-513.

Here the fact of damage is determined by whether there is a reasonable certainty the property would have been developed, not whether there is a reasonable certainty the development would have been profitable. Hence, if there were a reasonable certainty that this property would have been developed, lost profits would seem to be a natural consequence of plaintiff's breach, and a jury would decide the amount. Conversely, if there were no reasonable certainty the property would have been developed, then defendant's claim for lost profits would be speculative.

In our opinion, the contract at issue is a preliminary step in the real estate development process. At such an early stage, defendant cannot possibly prove lost profits with reasonable certainty. In other

words, at this point any claim for lost profits is too remote, speculative and contingent. Defendant's president testified in his deposition that only about one in twelve of his development projects come to fruition; and that until the due diligence phase is completed, he cannot say with any certainty that a project will actually be developed. On the basis of this testimony and the lack of any other evidence to the contrary, no facts could develop to support a conclusion that, at this stage of the process, there exists a reasonable certainty that the property would have been developed and defendant would have earned a profit. Consequently, defendant's claim for lost profits was properly dismissed.

Next, defendant claims that the trial court improperly concluded that defendant failed to state a claim for misrepresentation. The trial court specifically declined to dismiss defendant's misrepresentation claim on the undisputed facts, but ruled that because the allegation of misrepresentation related to a promise of future action, and such promises are legally insufficient to establish a misrepresentation claim, defendant failed to state a claim upon which relief can be granted. We disagree.

The general rule is that "[s]tatements promissory in their character that one will do a particular thing in the future are not misrepresentations, but are contractual in their nature, and do no constitute fraud." *Boston Piano & Music Co v Pontiac Clothing Co*, 199 Mich 141, 147; 165 NW 856 (1917). An exception to this rule exists where the fraud is based on a promise to perform a future act when there is an accompanying present intent at the time of the promise not to perform the future act. *Ainscough v O'Shaughnessey*, 346 Mich 307, 316-317; 78 NW2d 209 (1956). In the case at bar, defendant claims that plaintiff never intended to sell the property at issue to defendant, but simply wanted defendant to use defendant's contacts at the Department of Natural Resources to assist in getting a wetlands dispute regarding the property settled. Such a claim falls within the exception to the future promises rule; consequently, defendant has stated a claim upon which relief can be granted.

Last, while not outcome determinative, we briefly address two of defendant's other claims in the event they arise on remand. Defendant also claims the trial court improperly denied mediation. MCR 2.403(A)(2) provides that a trial court may except a case from mediation if it finds that mediation would be inappropriate. In the case at bar, we find the trial court's reasoning for denying mediation to be supported by the law, logic and reason; therefore, it was not an abuse of discretion. Next, defendant claims the trial court's expedited pre-trial schedule was unreasonable. While defendant has failed to sufficiently show how the expedited schedule prejudiced it, we do encourage the trial court to attempt to be more accommodating of both parties when scheduling further proceedings on remand.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ David H. Sawyer
/s/ Janet T. Neff