

STATE OF MICHIGAN
COURT OF APPEALS

CHERYL L. SIEBER,

Plaintiff-Appellant,

v

AMANDA CONTI DUHAIME and
PAUL DUHAIME,

Defendant-Appellees,

and

PHILIP F. GRECO TITLE COMPANY¹,

Defendant.

UNPUBLISHED

January 29, 1999

No. 205205

Wayne County Circuit

LC No. 96-645059 CK

Before: Kelly, P.J., and Hood and Markey, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendants DuHaimes' motion for summary disposition and denying plaintiff's motion for summary disposition. We reverse.

Plaintiff and defendants entered into a contract for the sale of real estate. The contract provided that plaintiff would purchase the property from defendants for \$725,000, and a deposit of \$50,000 was tendered. Plaintiff obtained a mortgage commitment but did not close on the sale of the home. Plaintiff filed suit for breach of contract to recover the \$50,000 deposit. Defendants filed counter-claims alleging that plaintiff breached the contract, therefore, the \$50,000 was forfeited as liquidated damages. The trial court granted summary disposition in favor of defendants and denied plaintiff's motion for summary disposition, holding that plaintiff breached the contract after failing to close on the sale after obtaining a mortgage commitment.

A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. This Court must consider the pleadings, affidavits, depositions and other documentary evidence

available to it and grant summary disposition if there is no genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of law. Summary disposition decisions are reviewed de novo to determine whether the prevailing party was entitled to judgment as a matter of law. *Hughes v PMG Building, Inc*, 227 Mich App 1, 4; 574 NW2d 691 (1997).

The trial court held that the purchase agreement only imposed the obligation on plaintiff to obtain a mortgage commitment. Therefore, irrespective of the contingencies contained within the mortgage commitment, the failure to close on the property after receipt of the commitment caused plaintiff's forfeiture of her deposit as liquidated damages. However, review of the payment language of the purchase agreement reveals that three obligations were imposed upon plaintiff. The purchase agreement provided, in relevant part:

2. Payment of the purchase money shall be made in U.S. funds by cash, cashier's check or bank money order upon the following conditions: A) The execution and delivery of the usual WARRANTY Deed, provided Purchasers are able to secure a (CONVENTIONAL) mortgage commitment in the amount of \$ \$500,000.00 or for ____ % of the sale price for a term of 30 years at prevailing interest rates, for which mortgage purchaser agrees to apply within 3 days from acceptance of this contract and timely comply with the lender's application requirements and *accept financing promptly if tendered*. [Emphasis added.]

Pursuant to the purchase agreement, plaintiff had to obtain a conventional mortgage commitment, plaintiff had to apply within three days of the acceptance of the contract for the financing and comply with application requirements and plaintiff had to accept financing if tendered. Review of the purchase agreement reveals that it was accepted on August 3, 1996. Donald Maxwell, Jr., a representative of Comerica Mortgage, testified that the application process began on August 5, 1996. Therefore, plaintiff commenced the application process within the time frame provided in the purchase agreement.

Plaintiff was also required to obtain a mortgage commitment in the amount of \$500,000. Maxwell testified that on August 8, 1996, the loan was denied for insufficient income. Maxwell testified that plaintiff cooperated with Comerica Mortgage's request for additional documentation. After additional consideration, the loan was conditionally approved by Comerica Mortgage on August 15, 1996. However, the approval was contingent upon plaintiff's sale of property located at 16615 East Jefferson with net proceeds of \$124,000. Plaintiff attempted to comply with the requirement of the sale of this residence, but Comerica Mortgage refused to release the contingency where the sale was based on a land contract to plaintiff's husband. Therefore, plaintiff obtained a mortgage commitment with an open approval subject to the sale of her home. Accordingly, plaintiff complied with the requirement of the purchase agreement that she obtain a mortgage commitment.

Lastly, plaintiff was required to accept financing. However, the terms of the contract provided that financing should be accepted *if tendered*. However, Comerica Mortgage would not supply the funds until plaintiff sold her home. In *Meagher v Wayne State University*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997), this Court set forth the following rules of contract construction:

Under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court. If the contract is subject to two reasonable interpretations, factual development is necessary to determine the intent of the parties and summary disposition is therefore inappropriate. If the contract, although inartfully worded or clumsily arranged, fairly admits of but one interpretation, it is not ambiguous. The language of a contract should be given its ordinary and plain meaning. Parol evidence is not admissible to vary a contract that is clear and unambiguous, but may be admissible to prove the existence of an ambiguity and to clarify the meaning of an ambiguous contract. [Citations omitted.]

Review of the contract reveals that plaintiff was to accept financing if tendered. Any action on the part of plaintiff was contingent upon Comerica Mortgage tendering the requisite mortgage amount. Therefore, the trial court erred when it concluded that contingencies between plaintiff and Comerica Mortgage were not set forth in the contract.

In *Knox v Knox*, 337 Mich 109, 118; 59 NW2d 108 (1953), the Supreme Court distinguished a condition precedent from a promise to discharge an obligation, stating:

A condition precedent is a fact or event which the parties intend must exist or take place before there is a right to performance. A condition is distinguished from a promise in that it creates no right or duty in and of itself but is merely a limiting or modifying factor. If the condition is not fulfilled, the right to enforce the contract does not come into existence. Whether a provision in a contract is a condition the nonfulfillment of which excuses performance depends upon the intent of the parties, to be ascertained from a fair and reasonable construction of the language used in the light of all the surrounding circumstances when they executed the contract. [Citations omitted.]

Review of the plain language of the contract reveals that plaintiff did not agree to consummate the sale upon receipt of the mortgage commitment alone. Rather, plaintiff was required to accept the financing if it was tendered by Comerica Mortgage. Thus, a condition precedent to any breach of duty by plaintiff of the purchase agreement for failing to provide the mortgage funds was Comerica Mortgage's tender of the funds. As Comerica Mortgage failed to release the funds unless plaintiff sold her home, plaintiff had no duty to proceed to closing without the financing. *Knox, supra*, 337 Mich 118.

Furthermore, the purchase agreement also contained the following provision:

B) Purchaser shall remove the mortgage contingency within 5 days from acceptance of this contract by either a letter to Seller removing the contingency or by providing written confirmation from a lender that a mortgage commitment has been issued in the amount above specified. If purchaser is unable to remove the mortgage contingency within the time limit specified, Seller may, upon written request of the Purchaser, extend the time limit to obtain a mortgage commitment or this contract shall without further action by Seller be null and void with the deposit being returned to Purchaser. In the event Purchaser is denied a mortgage commitment, Purchaser shall furnish Seller with

lender's written verification of mortgage denial. Upon Seller's receipt of such denial this contract shall become null and void and the deposit shall be returned to the Purchaser.

The date of the acceptance of the purchase agreement was August 3, 1996. Maxwell testified that on August 8, 1996, the application was denied. Therefore, within five days of acceptance of the purchase agreement, plaintiff did not remove the mortgage contingency. Pursuant to the terms of the contract, defendants could have extended the period upon written request of plaintiff. There is no documentary evidence to indicate that plaintiff requested a written extension of the amount of time to fulfill the mortgage contingency. As there is no indication that there was further action on the part of defendants, the purchase agreement was rendered null and void by the failure to grant an extension of the time period. Therefore, plaintiff was entitled to the return of her deposit.

In *Windorf v Ferris*, 154 Mich App 201, 203; 397 NW2d 268 (1986), the defendants purchased property on a land contract from the plaintiffs. The contract provided that the defendants would pay the taxes. The plaintiffs filed suit to foreclose the land contract alleging the defendants defaulted by failing to pay overdue property taxes, and the trial court granted the plaintiff's motion for summary judgment. On appeal, the defendants asserted that after entering into the contract the parties discussed delaying the payment of taxes. However, there was no written modification to the original contract as a result of the discussions. This Court held:

Ordinarily, a subsequent modification of a contract for the sale of land must be in writing to be legally enforceable. MCL 566.108; MSA 26.908 . . . Defendants do not assert a legally enforceable modification to the contract. At some point after entering into the contract, defendant discussed with plaintiff Andrew Sepesi the possibility of delaying the payment of taxes. No written modification to the original contract resulted from this discussion. No consideration for plaintiffs forbearance was offered or accepted. There is no claim that plaintiffs ever consented to the suggested modification; their assent was a necessary condition precedent to a valid contract setting aside the provisions of an expressed written contract. [*Windorf, supra*, 154 Mich App 203-204 (citations omitted).]

In the instant case, there is no evidence that any extension of the closing date was requested by plaintiff and placed in writing. Therefore, pursuant to *Windorf, supra*, 154 Mich App 203-204 and the terms of the contract itself, the agreement became null and void, and plaintiff was entitled to the return of the deposit.

Defendant opposed plaintiff's motion for summary disposition contending that plaintiff had obtained a mortgage commitment, yet refused to close on the purchase of the property. In opposition to the motion, defendants submitted an affidavit from licensed real estate agent John Buccino to establish that the mortgage commitment obtained by plaintiff satisfied the purchase agreement. Furthermore, Buccino opined that the requirement that plaintiff sell her home did not affect the validity of the contract. However, contract construction is a question of law for the trial court. *Meagher, supra*, 222 Mich App 721-722. "[W]here the contract contains technical or trade terms, parol evidence to define and explain

the meaning of those terms or phrases is permissible.” *SSC Associates v General Retirement System*, 210 Mich App 449, 452; 534 NW2d 160 (1995). In *SSC*, this Court held that it was proper for the trial court to accept extrinsic evidence through expert witness testimony to ascertain the meaning of technical terms such as “internal rate of return.” In the instant case, the contract terms can be given their plain meaning and are not technical and trade terms. Furthermore, defendants’ position and Buccino ignore the language of the payment provision which provides that plaintiff was to accept financing “if tendered.” Pursuant to the terms of the contract, plaintiff’s inability to accept financing, as it was not tendered, entitled her to the return of the deposit as the condition precedent to a duty to perform was not fulfilled. Accordingly, the trial court erred in denying plaintiff’s motion for summary disposition and granting defendants’ motion for summary disposition. Therefore, we reverse the trial court’s award of summary disposition in favor of defendants, and grant plaintiff’s motion for summary disposition. Remanded for entry of judgment in favor of plaintiff in the amount of \$50,000 damages plus interest, costs and attorney’s fees as determined by the trial court.

Reversed and remanded. We do not retain jurisdiction.

/s/ Michael J. Kelly

/s/ Harold Hood

/s/ Jane E. Markey

¹ Philip F. Greco Title Company is not a party to this appeal.