STATE OF MICHIGAN

COURT OF APPEALS

EAST RIVER MACHINE & TOOL, INC., Plaintiff-Appellee,	UNPUBLISHED February 1, 2000
v	No. 213132 Muskegon Circuit Court
CHARTER TOWNSHIP OF MUSKEGON, Defendant-Appellant.	LC No. 97-335994-CZ

Before: Murphy, P.J., and Hood and Neff, JJ.

PER CURIAM.

This case arises out of a dispute over whether defendant entered into a contract under which it was responsible for the payment of plaintiff's sewage and water fees. Defendant appeals as of right from the circuit court's order of judgment for plaintiff. We affirm.

I

In 1995, defendant was beginning to develop a proposed industrial park and plaintiff's three owners were looking for a place to relocate their business. Negotiations began between plaintiff and defendant's economic development coordinator, who was an independent contractor, not a township employee. The question of whether plaintiff would have to pay water and sewer hook-up fees was an early issue in the negotiations and plaintiff's first offer to purchase two acres of land in the industrial park included a provision that the seller, defendant, be responsible for those fees.

Defendant's response to plaintiff's first offer to purchase did not reject outright the provision regarding the fees, but added qualifying language indicating that defendant would provide for the fees if the fees could be paid for with "grant eligible funds." Negotiations continued and plaintiff submitted a revised offer to purchase, but the language regarding the fees remained the same as in plaintiff's original offer and did not include the qualifying language from defendant's first response.

Defendant responded to plaintiff's revised offer and again qualified the language relating to the fees, but differently; the reference to "grant eligible funds" was omitted and additional language provided "Seller will also pay sewer tap fees and water tap fees for the initial 5,000 foot-square building only."

There was testimony that the latter was an indication that if plaintiff chose to expand its plant at some point in the future, it would be responsible for water and sewer fees associated with the expansion.

A signed offer to purchase was submitted to defendant's board, incorporating the language indicating that defendant would pay the fees only for the initial 5,000 square foot building. What occurred at the meeting is subject to some dispute, but within the next day or two, defendant faxed a document titled "OPTIONS FOR INDUSTRIAL SITE"[1] to plaintiff which, among other things, acknowledged receipt of plaintiff's deposit of $2,000. About two weeks later, defendant's board gave final approval of the sale to plaintiff. No closing ever took place, but plaintiff paid the balance due, obtained title and began construction on its plant. It was not until plaintiff's construction contractor attempted to obtain permits from defendant to proceed with the building that plaintiff became aware of defendant's position that plaintiff was responsible to pay the fees. Plaintiff paid the fees under protest and then sued defendant to get the money (approximately $12,000) back. A bench trial resulted in a judgment for plaintiff.

II

Defendant's first argument on appeal is that the trial court erred in finding that defendant's economic development coordinator, Jack Joslyn, could bind defendant to a contract. We agree, See *Superior Ambulance v Lincoln Park*, 19 Mich App 655, 661; 173 NW2d 236 (1969) and *Johnson v Menominee*, 173 Mich App 690; 434 NW2d 211 (1988). However, we find the error harmless because the trial court ruled in favor of plaintiff based on the actions of defendant's board, not on the actions of the independent contractor.

Defendant did not argue at trial that the board never considered plaintiff's purchase offer, or that Joslyn acted alone in executing and accepting that offer. Instead, defendant argued that while it may have considered plaintiff's offer, it rejected that offer and made a counteroffer in the form of the "OPTIONS FOR INDUSTRIAL SITE". The trial court's decision was based on its finding that this alleged counteroffer was actually an acknowledgment by defendant that the terms of plaintiff's offer had been accepted. Therefore, it was not the actions or representations of Joslyn that were held to have bound defendant to the terms of plaintiff's offer, but the actions of defendant itself, through its board and its supervisor. Thus, the court's statement in a footnote that Joslyn, the independent contractor, had the authority to bind defendant, did not affect the outcome of the trial, and represents nonconstitutional harmless error. *In re Hamlet, (After Remand)*, 225 Mich App 505, 518; 571 NW2d 750 (1997).

III

Defendant's next argument is that the trial court erred by not finding that the statute of frauds' requirements for a contract for the sale of land were not satisfied in this case. We disagree.

The trial court found that there were two signed instruments which formed the contract between the parties. The first is the second revision of plaintiff's purchase offer, which was reviewed by defendant's board. The second is defendant's option instrument, which was faxed to plaintiff within a

day or two of the review of the purchase offer. These two signed documents were sufficiently related to satisfy the statute of frauds.

In *Randazzo v Kroenke*, 373 Mich 61, 67; 127 NW2d 880 (1964), our Supreme Court stated:

> "Separate writings which are related in subject matter may be read together to satisfy the requirement of the statute for a memorandum not only where both are signed by the party to be charged, but also where only one of them is signed, if they are so connected that the signature appearing upon the one can be said to authenticate the other one which is unsigned. Under such circumstances it is deemed that there is in fact a reference in the one instrument to the other, or, as some authorities declare, the reference required to incorporate the other paper in the memorandum is implied, or, as otherwise stated, there is an incorporation by necessary inference." [Quoting 49 Am Jur, Statute of Frauds, § 394, p 699.]

Defendant's option document contained a description of the property, the agreed-upon purchase price, and the down payment amount. It contained no terms that conflicted with the terms of plaintiff's purchase offer, but merely clarified that plaintiff was receiving an option to purchase the property, rather than purchasing the property itself. Under the circumstances, defendant's signed option instrument and plaintiff's signed purchase offer can be seen as substantially connected, and thus the statute of frauds was satisfied under the test set out in *Randazzo*.

IV

Defendant next argues that the trial court committed clear error when it failed to categorize defendant's option instrument as a counteroffer. We disagree.

We will not set aside a trial court's findings of fact unless clearly erroneous. MCR 2.613(C). A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made. *Tuttle v Dep't of State Hwys*, 397 Mich 44; 243 NW2d 244 (1976). We review questions of law de novo. *Bennet v Weitz*, 220 Mich App 295, 299; 559 NW2d 354 (1996).

The trial court found that defendant intended to accept the terms of plaintiff's purchase offer, which defendant reviewed at its board meeting. The court also found that this acceptance was evidenced by the signed instruments that were faxed to plaintiff the following day. These findings were justified under the rules of contract interpretation, and were not clearly erroneous.

In *Thomas v Ledger*, 274 Mich 16, 21; 263 NW 783 (1935), our Supreme Court stated:

> "In order that there may be a meeting of the minds which is essential to the formation of a contract, the acceptance of the offer must be substantially as made. There must be no variance between the acceptance and the offer. Accordingly a proposal to accept, or an acceptance, upon terms varying from those offered, is a rejection of the

> offer, and puts to an end the negotiation, unless the party who made the original offer renews it, or assents to the modification suggested." [Quoting 6 RCL, p 608.]

Also, we have held that to determine whether a meeting of the minds has occurred, we impose an objective standard and look to the express words of the parties and their visible acts, not their subjective states of mind. *Kamalnath v Mercy Hospital*, 194 Mich App 543, 548; 487 NW2d 499 (1992). The trial court's opinion reflects a recognition of, and adherence to, these rules of contract interpretation.

The trial court based its holding that defendant intended to accept the terms of plaintiff's purchase offer on several relevant findings of facts. The court noted that Joslyn did not make any changes to the term in plaintiff's purchase offer relating to the payment of sewage and water fees before he and the township supervisor presented it to the board. Joslyn had made changes to this term in the two previous offers. Also, the court found that the brevity (one minute) of Joslyn's phone call to plaintiff on the same day the option document was faxed undermined the supervisor's testimony that the parties still had large unresolved differences. The court found that it was more likely that this phone call was an acknowledgment that the offer had been accepted, rather than a discussion of a proposed counteroffer. These findings of fact are not clearly erroneous, and support the trial court's finding that defendant demonstrated an objective intent to accept the terms of plaintiff's purchase offer.

The court found that defendant manifested this intent to accept plaintiff's offer by faxing the signed option documents within a day or two of considering plaintiff's offer to purchase. This finding was based on the fact that the instruments did not contain any terms that varied from the terms of plaintiff's purchase offer, and more importantly, the instruments did not contain any space for plaintiff's signature. The trial court concluded that the fact that there was no area reserved for plaintiff's signature left plaintiff with "no reason to believe that it needed to sign anything else." These findings of fact are reasonable, and justify the trial court's holding that the document was an acceptance proposal rather than a counteroffer. Therefore, no clear error was committed by the trial court in its determination that defendant intended to accept the terms of plaintiff's purchase offer, and that defendant's signed instruments are evidence of that intent.

V

Defendant's final argument is that the trial court committed clear error when it found that plaintiff's building contractor did not have authority to bind plaintiff to an agreement to pay the sewage and water fees. We disagree. The trial court found that because defendant's supervisor, clearly understood that the building contractor did not have the authority to bind plaintiff to such an agreement, no apparent authority existed. This finding was not clearly erroneous.

Our Supreme court addressed the issue of apparent authority in *Atlantic Die Casting Co v Whiting Tubular Products*, 337 Mich 414, 422; 60 NW2d 174 (1953), stating:

> Whenever a principal has placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is

> justified in assuming that such agent is authorized to perform in behalf of the principal the particular act, and such particular act has been performed, the principal is estopped from denying the agent's authority to perform it. [Quoting 21 RCL, p 856; quotation marks omitted.]

The Court also noted that the existence of apparent authority is to be determined "from all of the facts and circumstances properly admitted in evidence." *Id.* There is sufficient evidence in the record to support the trial court's finding that defendant was not justified in its alleged belief that the building contractor had authority to bind plaintiff to an agreement to pay the sewage and water fees.

Aley, the township supervisor, testified that he has known Hughes, the building contractor, for many years. He testified that he allowed the permits to be issued, even though the sewage and water fees had not been paid, because he trusted Hughes. Hughes testified that he did not recall any conversation with Aley regarding the payment of plaintiff's fees. Even if the court found Aley's testimony more credible than Hughes', Aley's testimony indicates that the permits were issued because of the personal relationship between Aley and Hughes, not because of the perceived authority of Hughes to bind plaintiff to a promise to pay the fees. Furthermore, Aley testified that, to his knowledge, Hughes had never made promises to pay fees for clients in the past. This statement further supports the trial court's finding that defendant was not justified in believing that Hughes had the authority to bind plaintiff to an agreement to pay the fees. The trial court could have reasonably concluded that if Hughes had never demonstrated such authority in the past, it was unreasonable for defendant to assume he had such authority on this particular occasion.

Affirmed.

/s/ William B. Murphy
/s/ Harold Hood
/s/ Janet T. Neff

[1] This document apparently was necessary because defendant did not yet have title to the property.