STATE OF MICHIGAN

COURT OF APPEALS

TINA GRIFFIN,

Plaintiff-Appellee,

v

DAVID L. BUCKIUS and BUCKIUS BUILDERS, INC.,

Defendants-Appellants.

UNPUBLISHED
August 4, 2000

No. 218140
Kent Circuit Court
LC No. 98-000525-CK

Before: Bandstra, C.J., and Jansen and Whitbeck, JJ.

PER CURIAM.

Defendants appeal as of right from the trial court's order denying their motion for summary disposition and granting summary disposition in favor of plaintiff. We reverse in part, affirm in part, and remand.

This case arises out of a 1994 oral agreement between plaintiff and defendant David Buckius ("defendant") to purchase, renovate, and sell a farmhouse and to share in the resulting profit. Defendant argues that the trial court incorrectly concluded that defendant's occupation of the house as a residence and his failure to make timely repairs constituted a sale under the contract. We agree.

The trial court denied defendant's motion for summary disposition and granted summary disposition to plaintiff. MCR 2.116(I)(2). This Court reviews rulings on summary disposition de novo. *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 396-397; 605 NW2d 685 (1999). Further, this Court reviews questions of law de novo. *Bennett v Weitz*, 220 Mich App 295, 299; 559 NW2d 354 (1996).

As we previously noted, the contract in this case was not written, but oral. However, the parties did not disagree on the material terms of the oral contract; they disagreed only on whether a breach had occurred. In addition, the material terms of the contract, which provided for plaintiff to share in the proceeds from the sale of the house, were unambiguous. "[W]here the terms of a contract are unambiguous, their construction is for the court to determine as a matter of law, and the plain meaning of the terms may not be impeached with extrinsic evidence." *Zurich Ins v CCR & Co (On*

Rehearing), 226 Mich App 599, 604; 576 NW2d 392 (1997) (citation omitted). Our Supreme Court has ruled that, when interpreting contracts, courts may not "create an ambiguity where none exists." *Allstate Ins v Freeman*, 432 Mich 656, 666; 443 NW2d 734 (1989). The trial court in the present case found that defendant's use of the house as a residence and his failure to make timely repairs constituted a sale pursuant to the contract between defendant and plaintiff.

The court's interpretation of what constitutes a sale is not justified by the plain meaning of the term. The applicable dictionary definition of the term "sale" is "[t]he transfer of property or title for a price." Black's Law Dictionary, (7th ed), p 1337. No title or property was transferred because of defendant's use of the house as a residence or his failure to make repairs in a timely fashion. Defendant's actions may have changed the character of the property from investment to residential property. However, this change in character cannot be defined as a "sale" under the plain meaning of that term, in the context of the parties' agreement.

After finding that a sale of the property had occurred, the court employed the remedy of rescission because it found that it was impossible to calculate the profits from the sale. Rescission of a contract is "an equitable remedy which is granted only in the sound discretion of the court." *Stanton v Dachille*, 186 Mich App 247, 260; 463 NW2d 479 (1990), quoting *Lenawee Co Bd of Health v Messerly*, 417 Mich 17, 31; 331 NW2d 203 (1982). Rescission of the contract in the present case was based solely on the trial court's finding that a sale of the property had occurred, thereby triggering plaintiff's right to payment. Because the trial court's finding that a sale occurred was erroneous, the employment of the equitable remedy of rescission on this basis was also erroneous. Therefore, we find that the trial court improperly granted summary disposition in favor of plaintiff.

Defendant next argues that the trial court should have granted his motion for summary disposition because plaintiff is not entitled to payment under the contract and he has not materially breached the contract by failing to perform. We disagree.

"A motion under MCR 2.116(C)(10) tests the factual basis underlying the plaintiff's claim." *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 202; 544 NW2d 727 (1996). The trial court reviews the record evidence and all reasonable inferences drawn from it, and decides whether a genuine issue regarding any material fact exists to warrant a trial. *Id.* As previously noted, this Court reviews a trial court's ruling on motion for summary disposition de novo. *Id*.

This Court has stated that rescission of a contract may be warranted if there has been "a material breach affecting a substantial or essential part of the contract." *Omnicom v Gianetti Investment Co*, 221 Mich App 341, 348; 561 NW2d 138 (1997). With regard to the factors that should be considered when determining whether a material breach has occurred, allowing for rescission, this Court stated:

> [Courts] should consider whether the nonbreaching party obtained the benefit it reasonably expected to receive. Other considerations include the extent to which the injured party may be adequately compensated for damages for lack of complete performance, the extent to which the breaching party has partly performed, the

> comparative hardship on the breaching party in terminating the contract, the wilfulness of the breaching party's conduct, and the greater or lesser uncertainty that the party failing to perform will perform the remainder of the contract. [*Id*. (citation omitted).]

In the present case, while we have concluded that no sale has triggered a payment obligation, genuine issues of material fact exist as to whether defendant materially breached the contract in other ways. If he has, rescission would be warranted.

For example, a genuine issue of material fact exists regarding whether defendant's failure to perform timely renovation work on the house constituted a material breach of contract, allowing rescission. See, e.g., *Smith v Michigan Basic Property Ins Ass'n*, 441 Mich 181, 191 n 15; 490 NW2d 864 (1992), citing *Maine Mut Fire Ins Co v Watson*, 532 A2d 686, 688, 689 (Me 1987) (when no time for performance is specified in a contract, a reasonable time is implied); Calimari & Perillo, Contracts (3d ed), p 58 (reasonable time for performance may be implied term in contracts). Defendant apparently presented the trial court with receipts demonstrating that substantial renovation work was done in 1995; these receipts are either not in the record, or are among the unreadable copies of receipts within defendant's deposition exhibits. However, defendant testified that he did only a small amount of renovation work on the house in 1996 and 1997 because he "just couldn't afford to do any more." Defendant testified that he did trim work and added a deck to the house in 1996 or 1997, but he produced no evidence to support this testimony. The amount of renovation work done by defendant is a genuine issue of material fact, because defendant's obligation under the contract was to renovate the house so that it could be sold for a profit. There is not enough evidence in the record to support a finding as a matter of law that defendant committed a material breach of contract by failing to perform in a timely fashion. Nor has defendant produced sufficient evidence to support a conclusion as a matter of law that he did not commit a material breach of contract in this regard.

There is also a genuine issue of material fact concerning whether defendant's encumbrance of the property with his personal debt constituted a material breach of contract. Defendant admitted that the original mortgage on the home was approximately $89,000. There is no copy of the original mortgage in the record. In 1996, defendant refinanced the house, and increased the mortgage amount to $140,000. Defendant stated that, when the house is eventually sold, only the original mortgage amount of $89,000 will be used in the calculation of plaintiff's share of the profits from the sale. Defendant also admitted that he used the house as security for a $30,000 business loan in 1996 or 1997. There is no evidence relating to this loan in the record. Defendant stated that this loan will not be considered when plaintiff's share of the profits from the sale of the property are calculated. Notwithstanding defendant's assurances, his severe encumbrance of the property with his personal debt may constitute a material breach of contract because it may drastically affect plaintiff's ability to receive the benefit from the contract that she reasonably expected to receive. However, summary disposition is not warranted because there is insufficient evidence in the record relating to: (1) the amount of the loans; (2) defendant's payment of the loans; and (3) defendant's financial ability to pay the loans and provide plaintiff with her portion of the profits when the house is sold. We remand this case for further factual findings relating to defendant's encumbrance of the house with his personal debt, the amount and timeliness of renovation work done by defendant and other alleged material breaches of the parties'

agreement. Should the trial court determine that such breaches have occurred, further determinations can be made concerning whether plaintiff is entitled to rescind the agreement and, if so, the appropriate remedy.

We affirm in part, reverse in part and remand. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Kathleen Jansen
/s/ William C. Whitbeck