STATE OF MICHIGAN

COURT OF APPEALS

GRAYLING TAKE AWAY, INC., Plaintiff-Appellee,	UNPUBLISHED March 13, 2001
v	No. 221049 Crawford Circuit Court
LAUREN WHOLESALE, INC., Defendant-Appellant.	LC No. 98-004621-CK

Before: McDonald, P.J., and Fitzgerald and Saad, JJ.

PER CURIAM.

Defendant Lauren Wholesale, Inc. appeals as of right from an order granting judgment for plaintiff. We affirm.

This dispute concerns the interpretation of a management agreement and option contract to purchase a gas station and convenience store. Plaintiff brought suit to terminate the management agreement, invalidate the option contract, and determine responsibility for payment of real estate and property taxes. Defendant maintained the agreement was valid and continued in possession of the property. Before trial, the parties settled most issues and the only questions remaining were whether the option contract was to be strictly enforced with regard to its time provisions and who was responsible for paying the outstanding taxes. These issues were decided by the bench trial: the terms of the option contract were to be strictly construed and defendant was responsible for paying the outstanding taxes. From this judgment defendant appeals.

Defendant first argues plaintiff should be estopped from enforcing the time provisions of the option contract because of plaintiff's acts of denying the validity of the option and bringing legal action. Defendant cites *O'Toole & Nedeau Co v Boelkins*, 254 Mich 44, 47; 235 NW 820 (1931), for the principle that the equitable doctrine of estoppel should be applied against a vendor who fails to close on a real estate transaction pursuant to an option after being informed the purchaser was prepared to go forward. Defendant maintains it intended to exercise its option and was prevented when plaintiff declared the option was invalid. After reviewing the record we conclude defendant's stated intent is without factual support and is distinguishable from *O'Toole, supra*.

In general, an option contract for purchasing real property is a mere offer that requires strict compliance with the terms of the option both concerning the exact thing offered and within

the time specified. *Twp of Oshtemo v Kalamazoo*, 77 Mich App 33, 37; 257 NW2d 260 (1977). Failure to so comply results in loss of the rights under the option. *Id.*

O'Toole involved a purchaser who actually attempted to tender an offer but was frustrated by the non-attendance of the vendor. There, the Court held that the purchaser could not be deprived of his rights under an option by the vendor avoiding the purchaser until the time of performance had expired. *Id.* at 45.

> Acts insufficient in themselves to make a complete tender, may operate as proofs of readiness to perform, so as to protect the rights of a party under a contract, where a proper tender is made impossible by reason of circumstances not due to the fault of the debtor. . . . And if the tender is prevented through the contrivance of the persons to whom it should be made, it will be excused or be considered equivalent to a tender. [*O'Toole, supra* at 47.]

Here, although plaintiff asserted the agreement and the option were terminated, and defendant continued as if they were valid, no tender of performance was made. Defendant could have either treated plaintiff's assertions as a breach of contract or exercised its option within the time specified. *Stoddard v Manufacturers Nat'l Bank of Grand Rapids*, 234 Mich App 140, 163; 593 NW2d 630 (1999); *Clark v Muirhead*, 245 Mich 49, 50; 222 NW 79 (1928). A vendor's refusal to perform does not relieve the purchaser from accepting the option according to its terms and constitutes neither a waiver of the vendor's rights nor grounds for estoppel. *Id.* The terms of the option were clear and unambiguous regarding timing, and plaintiff cannot be estopped from insisting on strict construction of the terms because defendant did not believe or rely on assertions that the option was invalid. *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 491-492; 579 NW2d 411 (1998); *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 140-141; 602 NW2d 390 (1999). Defendant's letter to plaintiff stating that the option was valid and defendant would soon decide whether to exercise it or seek injunctive relief to stop a proposed sale was not an unequivocal statement of an intention to exercise the option, much less tender of performance. See *Clark, supra*.

We are reminded of the equitable maxim that equity does not help those who slumber upon their rights, *Sheldon v Miller*, 151 Mich 283, 288; 114 NW 1015 (1908), and in this instance, we agree with the trial court – because defendant made no attempt to preserve its rights under the option by attempting tender of the offer before October 21, 1998, defendant must accept the clear and unambiguous terms and pay the increased purchase price. Accordingly, we conclude the trial court did not err in granting judgment to plaintiff.

Defendant next argues the terms of the contract that govern the payment of real estate and personal property taxes are ambiguous. Generally, a contract must be interpreted according to its plain and ordinary meaning and is ambiguous only if its language may be reasonably understood in different ways. *UAW-GM, supra* at 491. If unambiguous, the meaning of the language is a question of law and the intent of the parties must be discerned from words used in the instrument. *Moore v Campbell, Wyant & Cannon Foundry*, 142 Mich App 363, 367; 369 NW2d 904 (1985). Conflict between clauses should be harmonized, and the contract should not be interpreted to render it unreasonable. *South Macomb Disposal Authority v American Ins Co (On Remand)*, 225 Mich App 635, 653; 572 NW2d 686 (1997).

A close examination of the disputed provisions reveals ¶ 2 requires defendant to pay real estate and personal property taxes and other expenses "necessary" to the operation of the business, while ¶ 3(H) prohibits transfer of liabilities "incidental" to the operation of the business. "Incidental" is defined as "depending upon or appertaining to something else as primary; . . . something incidental to the main purpose." Black's Law Dictionary (6th ed), citing *Davis v Pine Mountain Lumber Co*, 273 Cal App 2d 218, 223; 77 Cal Rptr 825 (1969). The reasonable conclusion, according to the plain and ordinary meaning, is that there is no ambiguity, and ¶ 3(H) prohibits the transfer of liabilities that are merely incidental to the operation of the business. *Michigan Nat'l Bank v Laskowski*, 228 Mich App 710, 714; 580 NW2d 8 (1998). Moreover, this interpretation conforms with the actions of the parties because defendant's payments of the rent and utilities evidences that the parties intended ¶ 2 govern "necessary" expenses and ¶ 3(H) refer to incidental liabilities. *Putman v Pere Marquette R Co*, 174 Mich 246, 253; 140 NW 554 (1913). Accordingly, we agree with the trial court that defendant is responsible for the payment of real estate and personal property taxes.

Affirmed.

/s/ Gary R. McDonald
/s/ E. Thomas Fitzgerald
/s/ Henry William Saad