STATE OF MICHIGAN

COURT OF APPEALS

ROBERT HIGGS,

Plaintiff-Appellant,

v

RONALD LATIFF, ALEX LUCIDO and LUCIDO & ASSOCIATES, INC.,

Defendants-Appellees,

and

JOHNATHON D. THOMAS, IVY LEAGUE MORTGAGE COMPANY, a/k/a COMMUNITY RESIDENTIAL FUNDING CORPORATION, RENAISSANCE MORTGAGE, INC., a/k/a RENAISSANCE MORTGAGE COMPANY, a/k/a MARINER PROPERTIES, L.L.C.,

Defendants.

UNPUBLISHED
May 4, 2001

No. 216306
Wayne Circuit Court
LC No. 98-819692-CK

Before: Bandstra, C.J., and Griffin and Collins, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition. We reverse and remand.

Plaintiff submitted an offer to purchase a home for $226,000. Defendant Lucido, a real estate broker, submitted the offer to defendant Latiff, manager of the corporation that owned the home. The agreement provided that plaintiff's $5,000 deposit would be applied to the purchase price. The following provision also provided that the agreement was contingent on plaintiff's ability to secure financing:

> 2. The sale shall be completed by the following method:
>
> B. Delivery of a Warranty Deed conveying a marketable title. This agreement is contingent upon the purchaser being able to secure a conv. [sic]

> mortgage in the amount of $150,000 and pay $75,000 down plus mortgage costs, prepaid items, and adjustments in cash. Purchaser agrees to apply for such mortgage within 5 calendar days from Seller's acceptance of this agreement at his own expense. Purchaser further agrees that in connection with said application to lender, he will promptly comply with lender's request for necessary information required to process the loan application. If a firm commitment for such mortgage cannot be obtained within 30 calendar days from date of Seller's acceptance, at the Seller's option, this agreement can be declared null and void and the deposit shall be returned.

Further, paragraph 15 of the agreement provided:

> In the event of a default by the purchaser, the seller may elect to enforce the terms hereof or declare a forfeiture and retain the deposit as liquidated damages.

In preparation for completing the purchase, plaintiff attempted to obtain both a first mortgage on the subject property as well as two equity loans on unrelated real estate property. When unable to secure a mortgage by the original closing date, the parties agreed to adjourn the closing. Plaintiff was still unable to obtain a first mortgage on the property by the adjourned closing date, so he failed to appear at the scheduled closing and the transaction was not completed. Defendants subsequently declared plaintiff in default and retained his $5,000 deposit as liquidated damages.

Plaintiff filed suit alleging, inter alia, that defendants breached the contract by retaining his deposit. Defendants moved for summary disposition, pursuant to MCR 2.116(C)(8), arguing that the clear language of the contract provided the seller the option of retaining plaintiff's deposit upon default. The trial court granted defendants' motion, holding that, because plaintiff failed to appear for the closing, he was in default and defendants' retention of the deposit under this circumstance did not constitute a breach of the agreement. We disagree.

We review the trial court's decision to grant summary disposition de novo. *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 253; 571 NW2d 716 (1997). Further, the interpretation of a contract is an issue of law that is reviewed de novo on appeal. *Morley v Auto Club of Michigan*, 458 Mich 459, 465; 581 NW2d 237 (1998).

In the instant case, we agree with plaintiff that his inability to procure financing for the purchase did not result in a default of the purchase agreement under the express conditions of the contract. However, the trial court expressly stated that its decision was not based on paragraph 2(b). Instead, the court apparently reasoned that plaintiff was in "default" under paragraph 15 of the contract because plaintiff did not appear at the adjourned closing date.

However, the record contains no evidence regarding the parties' agreement as to the adjourned closing date. It is not clear whether, as with the original closing date, plaintiff had the right to a return of the deposit money if a mortgage was unavailable. There is nothing in the contract to indicate whether a failure to appear at a closing constitutes a default. There is also

nothing in the record to indicate whether plaintiff's failure to appear at the adjourned closing was a default under any additional agreement the parties may have made.

These and similar questions need further factual development. Because defendants have not established that plaintiff was in default under the purchase agreement, the trial court erred in granting defendants' motion for summary disposition.

We reverse and remand. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Richard Allen Griffin
/s/ Jeffrey G. Collins