STATE OF MICHIGAN

COURT OF APPEALS

CHARLES W. SCHNEIDER, Plaintiff-Appellee,	UNPUBLISHED May 29, 2001
v	No. 221519 Oakland Circuit Court
JAMES J. TOUHY, Defendant-Appellant.	LC No. 98-009893-CK

Before: McDonald, P.J., and Smolenski and K. F. Kelly, JJ.

PER CURIAM.

In this contract dispute, defendant appeals as of right from a circuit court order granting plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The trial court's ruling on a motion for summary disposition is reviewed de novo. *Gibson v Neelis*, 227 Mich App 187, 189; 575 NW2d 313 (1997). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. In ruling on such a motion, the trial court must consider not only the pleadings, but also depositions, affidavits, admissions and other documentary evidence, MCR 2.116(G)(5), and must give the benefit of any reasonable doubt to the nonmoving party, being liberal in finding a genuine issue of material fact. Summary disposition is appropriate only if the opposing party fails to present documentary evidence establishing the existence of a material factual dispute. *Smith v Globe Life Ins Co,* 460 Mich 446, 455; 597 NW2d 28 (1999).

The elements of a valid contract are (1) parties competent to contract, (2) proper subject matter, (3) legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation. *Thomas v Leja,* 187 Mich App 418, 422; 468 NW2d 58 (1991). The plaintiff bears the burden of proving the existence of the contract sought to be enforced. *Kamalnath v Mercy Memorial Hosp Corp,* 194 Mich App 543, 549; 487 NW2d 499 (1992).

Mutual agreement or mutual assent refers to a meeting of the minds on all material terms of the contract. *Id.* at 548-549. The parties' mutual assent may be expressed orally or in writing or by other acts or conduct, *Ludowici-Celadon Co v McKinley,* 307 Mich 149, 153; 11 NW2d 839 (1943), but is to be "judged by an objective standard, looking to the express words of the parties and their visible acts, not their subjective states of mind." *Heritage Broadcasting Co v Wilson Communications, Inc,* 170 Mich App 812, 818; 428 NW2d 784 (1988). However, a

contract for the sale of any land "shall be void, unless the contract, or some note or memorandum thereof be in writing, and signed by the party by whom the . . . sale is to be made . . . ." MCL 566.108; MSA 26.908. The material terms that must be in writing are the parties to the sale, the property to be sold, and the price to be paid. *Zurcher v Herveat,* 238 Mich App 267, 290-291; 605 NW2d 329 (1999).

The original purchase agreement was in writing, signed by defendant, and contained all material terms. The contract's amendment was also in writing. When read in conjunction with the original agreement, it referenced the property, the parties, and changed the purchase price and terms of payment. Defendant initialed those changes, signed the amendment, and placed the notation "accepted" next to his name. Based on an objective standard, defendant clearly agreed to the adjusted price terms in the amended agreement. The fact that he may have harbored a subjective intention to continue negotiations "is insufficient to show that a meeting of the minds did not occur." *Heritage Broadcasting Co, supra* at 819.

Defendant contends that the amendment constituted a counteroffer which plaintiff failed to accept. Defendant has failed to preserve this argument by citation to supporting authority. *Price v Long Realty, Inc,* 199 Mich App 461, 467; 502 NW2d 337 (1993). Assuming the amendment was a counteroffer which defendant submitted over his signature, it only had to be accepted by plaintiff to be valid. *Harper Bldg Co v Kaplan,* 332 Mich 651, 655-656; 52 NW2d 536 (1952). Plaintiff apparently rejected that counteroffer with a counteroffer of his own, given that the price terms were crossed out and changed. *Cheboygan Co Rd Comm v Auto-Owners Ins Co,* 87 Mich App 681, 684; 277 NW2d 176 (1978). Thus it had only to be accepted by defendant to be valid. *Harper Bldg Co, supra*. The objective evidence shows that defendant did accept the counter counteroffer by initialing the price term changes and writing "accepted" next to his name.

Defendant also contends that the amendment was an offer by plaintiff which he rejected by writing "We must work out ins. and what if there is a fire" before his name. This contention is contrary to defendant's argument that he drafted the amendment as a counteroffer for plaintiff's consideration. If both parties accepted the amendment as reflected by their signatures but left open what was to be done about insurance as reflected by the notation, the writing is more in the nature of an agreement to make a contract in the future, which would include the terms set forth in the amendment and an as yet to be determined insurance clause. "A contract to make a subsequent contract may be just as valid as any other contract. Like any other contract, a contract to make a contract can fail for indefiniteness if . . . it does not include an essential term to be incorporated into the final contract." *Opdyke Inv Co v Norris Grain Co,* 413 Mich 354, 359; 320 NW2d 836 (1982). Because the amendment, when read in conjunction with the original purchase agreement, clearly identified the parties, the property, and the consideration, it contained all material or essential terms. *Zurcher, supra* at 287, 289-291; *Heritage Broadcasting Co, supra* at 819. It was thus enforceable as written. The trial court did not err in so ruling by granting plaintiff's motion for summary disposition.

Affirmed.

/s/ Gary R. McDonald
/s/ Michael R. Smolenski
/s/ Kirsten Frank Kelly