STATE OF MICHIGAN

COURT OF APPEALS

VICTOR CORDOBA,

Plaintiff-Appellant,

v

CITY OF DETROIT,

Defendant-Appellee.

UNPUBLISHED
September 4, 2001

No. 221391
Wayne Circuit Court
LC No. 98-813104-CK

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

PER CURIAM.

Plaintiff appeals as of right an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

On May 5, 1993, plaintiff and defendant entered into a land development agreement. Defendant agreed to convey certain Detroit real estate to plaintiff in exchange for plaintiff's development of the real estate into a commercial property called "Plaza Mexico." The agreement specified that construction on the project "shall be completed within 48 months of the date of delivery of the Deed." The agreement also provided that the conveyance was a fee simple determinable, pending defendant's determination that the project was substantially complete. The agreement provided that, in the event of plaintiff's default, the property would revert to defendant. The agreement also contained a force majeure provision which provided that, in the event of unforeseeable delays beyond either party's control, a party could seek an extension by written notice within ten days of the beginning of the delay. This provision dictated that defendant's determination of what constitutes a force majeure would be controlling.

After defendant notified plaintiff that he was in default for failing to substantially perform his obligations within forty-eight months of delivery of the deed, plaintiff filed a complaint seeking declaratory and injunctive relief, to determine title to the property, and seeking time, pursuant to the force majeure provision, to complete Plaza Mexico. Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), contending that plaintiff had breached the agreement, that the force majeure provision was not operative under the circumstances, and that collateral estoppel precluded litigation on the matter. The trial court granted defendant's motion.

Plaintiff argues that the court erred in granting summary disposition. We review de novo a trial court's ruling on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109,

118; 597 NW2d 817 (1999). A motion for summary disposition under MCR 2.116(C)(10) is properly granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 120. A court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence. *Id.* at 119-120. Only proffered, substantively admissible evidence is considered, although this evidence is reviewed in a light most favorable to the non-moving party. *Id.* at 120-121.

Plaintiff argues that the court erred in granting summary disposition because there was a genuine issue of fact concerning whether plaintiff substantially performed his contractual obligations. We disagree. In regard to Michigan's adoption of a substantial performance of contract rule, we have opined as follows:

> A contract is substantially performed when all the essentials necessary to the full accomplishment of the purposes for which the thing contract has been performed with such approximation that a party obtains substantially what is called for by the contract.
>
> Generally speaking, deviations from the absolute terms of a contract do not necessarily cause a failure of performance, but may entitle a party to extra compensation or damage. Imperfections in the matters of details which do not constitute a deviation from the general plan do not prevent the performance from being regarded as substantial performance. On the other hand, where the deviations or alterations are such as would essentially change the terms of performance, they will be considered as a failure of performance. [*Gibson v Group Ins Co*, 142 Mich App 271, 275-276; 369 NW2d 484 (1985) (quoting 6A Michigan Law & Practice, Contracts, § 314 pp 315-316).]

Generally, the question whether a party has substantially complied with an agreement is a question for the jury. *Franzel v Kerr Mfg Co*, 234 Mich App 600, 619; 600 NW2d 66 (1999). The trial court found that plaintiff failed to substantially complete the project within forty-eight months of delivery of the deed as required by the contract. On appeal, plaintiff argues that this finding was an improper resolution of a factual question.

Plaintiff notes that, in his answers to defendant's first set of interrogatories, he stated that: (i) the 64-space paved parking lot was substantially completed by October 1, 1996, at a cost of more than $120,000; (ii) although the agreement required construction of a 6,300 square foot structure, he constructed an 8,277 structure at a cost of more than $390,000; and (iii) in 1997, he applied for, but has yet to receive, approval from defendant to vacate the requisite alleys and street rights-of-way necessary to complete the project. However, we note that plaintiff was contractually obligated to construct a 6,300 square foot retail building, but instead constructed a building that, despite being larger, did not meet the contractual requirements. We believe that this difference certainly constituted a deviation from what was required by the agreement. At the very least, we do not believe that reasonable minds could conclude that defendant received "essentially" what it was entitled to under the contract.

It is also undisputed that plaintiff failed to plant the deciduous trees, as required by the contract. Along the same lines, plaintiff did not request approval from defendant to vacate the

requisite alleys and street rights-of-way before May 1997. Thus, we believe that the facts, viewed in a light most favorable to plaintiff, fail to create a genuine issue of material fact as to whether plaintiff substantially completed his contractual obligations.

Plaintiff further argues that there was a genuine issue of material fact as to whether defendant's notice of default was premature. Plaintiff specifically argues that the agreement required completion of the project forty-eight months from the date of delivery of the deed, and plaintiff did not physically receive the deed until September 1993. Defendant sent notice of default on June 25, 1997, which was less than forty-eight months after the deed was delivered under plaintiff's theory.

Generally, "[t]he purpose of the delivery requirement is to show the grantor's intent to convey the property described in the deed." *Energetics v Whitmill*, 442 Mich 38, 53; 497 NW2d 497 (1993). The test for determining whether there has been a delivery of the deed is whether the grantor's "words and actions" demonstrate an intent to convey a present interest in the land. *Litner's Estate v Meier,* 344 Mich 119, 123-124; 73 NW2d 205 (1955).

In this case, the parties signed the agreement and the deed on May 5, 1993. By this act, defendant showed an intention to surrender the instrument to plaintiff and to convey a present interest in the land. More importantly, there is no evidence that defendant did not intend to surrender possession on May 5, 1993, nor is there any evidence that defendant actually interfered with plaintiff 's possession before the date the deed was physically received by plaintiff. Plaintiff argues that there is a question of fact whether the parties, by the term "delivery," intended a meaning other than the ordinary meaning of the term. However, plaintiff submitted no evidence suggesting that term was ambiguous or should be construed contrary to its ordinary meaning. Thus, in light of the evidence presented, and giving the benefit of reasonable doubt to plaintiff, reasonable minds could not differ as to the meaning of the term "delivery" as used in the agreement. Therefore, the trial court did not err to the extent that it granted summary disposition on this basis.

Plaintiff also contends that there was a genuine issue of material fact regarding whether the force majeure provision of the contract should have operated to extend his time of performance. We disagree.

In *Erickson v Dart Oil*, 189 Mich App 679, 686; 474 NW2d 150 (1992), we noted that "force majeure" is a term that is "virtually unknown" in Michigan common law. Turning to other jurisdictions for guidance, we further noted that a force majeure clause may not be invoked to excuse performance where the delaying condition was caused by the party invoking it or could have been prevented by exercise of prudence, diligence, and care. *Id.* at 688, citing *Edington v Creek Oil Co*, 690 P2d 970 (Mont, 1984)). A party's "failure to explore or utilize available options to overcome the delaying condition can constitute lack of due diligence." *Erickson, supra* at 688, citing *Woods v Ratliff*, 407 So 2d 1375, 1378-1379 (La App, 1981). We recognized that the purpose of a force majeure clause is to relieve a party from termination of the agreement "due to circumstances beyond its control that would make performance untenable or impossible." *Erickson, supra* at 689, citing *Edington, supra* at 119. Nevertheless, a party may not invoke a force majeure clause to excuse performance where that party created the force majeure. *Erickson, supra* at 689, citing *Edington, supra* at 120.

The alleged force majeure in this case was a legal action initiated by Tres Galanes Corporation in 1996. A 1992 lawsuit by Tres Galanes sought ownership of the property from defendant, but was ultimately dismissed. On November 22, 1996, Tres Galanes filed another lawsuit, this time against both plaintiff and defendant, seeking a preliminary injunction in regard to construction that plaintiff had begun on parking spaces located adjacent to their restaurant. On May 29, 1997, plaintiff and Tres Galanes agreed to a mutual restraining order regarding the lots. On November 14, 1997, after continued disputes between plaintiff and Tres Galanes, the trial court ordered plaintiff to stop construction and remove barricades on the property.

Defendant argues that plaintiff cannot enforce the force majeure provision because these events were not beyond his control, nor were they unforeseeable. However, it is not evident from the facts that plaintiff caused the Tres Galanes litigation, nor is there any indication that plaintiff could have foreseen further litigation. Defendant also argues that plaintiff could have begun work on another part of the project in order to avoid the litigation. However, plaintiff's contractual obligations included completion of the areas in dispute; thus, a determination of whether plaintiff "substantially completed" his contractual obligations would necessarily include the work done in these disputed areas.

Nevertheless, § 25.10 of the agreement requires a party requesting a time extension based on a force majeure to provide notice to the other party within ten days of the event's occurrence. The record contains no evidence that plaintiff provided written notice that a time extension was necessary for any reason during the forty-eight month period. Instead, all of plaintiff's written requests for an extension were during or after the ninety-day cure period that defendant provided to plaintiff, which followed the expiration of the forty-eight month period for completing the project. To the extent that plaintiff even notified defendant that he was delayed by the earlier litigation, these notices were not accompanied by a request for a time extension, nor were they sent within ten days of the purported events. Therefore, we do not believe that plaintiff is entitled to rely on the force majeure provision of the agreement. Consequently, we conclude that the trial court correctly granted defendant's motion for summary disposition.

Finally, plaintiff contends that the trial court erred to the extent that it granted summary disposition based on the doctrine of collateral estoppel. However, having already concluded that the trial court properly granted summary disposition based on its resolution of the other issues, we need not address this issue.

Affirmed.

/s/ Richard A. Bandstra
/s/ William C. Whitbeck
/s/ Donald S. Owens