STATE OF MICHIGAN

COURT OF APPEALS

DAVID and ELAINE LEWENZ,
DAN and MARY ANN STAHL and
DON and MARY VALENTE,

Plaintiffs-Appellants

v

FREDA ALIBRI,

Defendant-Appellee.

UNPUBLISHED
December 14, 2001

No. 225709
Macomb Circuit Court
LC No. 99-001912-CK

Before: Cooper, P.J., and Cavanagh and Markey, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order denying plaintiffs' motion for summary disposition and granting summary disposition for defendant pursuant to MCR 2.116(I)(2). We affirm in part and reverse in part.

On April 2, 1990, the parties entered into a land contract for the sale of 102 E. Fisher for a purchase price of $30,000. The contract describes the property as "[t]he Easterly 30 feet 3 inches in width by 130 feet in depth . . . of the Westerly 1/2 of the Easterly 1/2 of Lot 3, Plat of BRUSH SUBDIVISION of Park Lot 5, and part of BRUSH FARM East of and adjoining park Lots 5 and 4 . . . ." Thereafter, the contract describes the property as containing approximately 3,900 square feet. A rider is attached to the contract and provides in pertinent part:

> That in the event buyer before 3-1-2000 sells or otherwise conveys or trades his interest in the subject property to any third party individual or business entity or before then negotiates the same which is ultimately consummated then, and in such event, the vendee herein shall as additional compensation pay the Vendors herein 50% of the consideration received by Vendee in excess of the $30,000.00 price herein.

The rider further establishes late charges and liquidated damages in the event of defendant's default.

> Late Charge: That Vendee shall forthwith pay Vendor, in addition to other payments called for herein, a 6% of the pymt. late charge for each principal and interest or other payment . . . called for under the terms of this land contract

> and not received by Vendor or a third party recipient within ten (10) days after their due date or by a non-sufficient funds check. For purposes of this provision the receipt date shall be the envelope post-mark date and said late charge shall apply for each thirty (30) day period after the initial grace period that a single delinquency exists.
>
> Liquidated Damages: That the Vendee shall forthwith pay Vendor as reasonable [sic] agreed to liquidated damages the sum of $1,000 in addition to principal, interest and late charges otherwise due, in the event of Vendee's default for over forty-five (45) days in any of the terms hereof enabling and occasioning Vendor's collection, forfeiture or foreclosure suit commencement . . . .

On January 3, 1997, defendant sold the property in question, along with several other parcels owned by defendant, to the Detroit Wayne County Stadium Authority for $6,331,381.68. On December 11, 1997, plaintiffs discovered the sale and sent a letter to defendant requesting confirmation of the sale and the additional consideration that was stipulated in their contract. Defendant provided the requested information and a check in the amount of $63,080.29 on December 30, 1997. Because the property was not sold individually, defendant determined its value by dividing the sale proceeds received by the total square footage. According to defendant, the total proceeds from the sale amounted to $6,261,596.46. Defendant also declared that the total measurement of all the properties was 148,560 square feet. Using these numbers, the net price per square foot was calculated to be $42.1486. Defendant multiplied this with the approximated 3,900 square feet of the subject property and determined that the total proceeds for the property, less attorney and accounting fees, amounted to $156,160.56.

Upon receipt of defendant's correspondence and payment, plaintiffs replied to defendant and insisted that the calculations were inaccurate because they were not based on the actual consideration received. According to plaintiffs, the total consideration was $6,324,000 and not defendant's net profit of $6,261,596.46. Plaintiffs also maintained that the property actually measured 3,932.5 square feet as opposed to the approximated measurement used by defendant.

Plaintiffs presented the above arguments to the trial court.[1] However, in their complaint, plaintiffs purported that the property measured 4,235 square feet, as depicted in the 1990 city tax bill, and not the 3,932.5 square feet that they had suggested in their earlier correspondence with defendant. Plaintiffs further contended that defendant defaulted by waiting almost a year after the sale to pay plaintiffs and that the contract provided for late charges and liquidated damages. Specifically, plaintiffs suggested that the 6% late charge be assessed from February 1997 until the receipt of defendant's "partial payment" of $63,080.29 on December 30, 1997. Because this payment was not based on the actual number of square feet, plaintiffs argued that defendant should also be charged the late fee on the amount remaining, $12,059.13, from the period of January 1998 thru April 1999. In all, plaintiffs' complaint asserted that the late charges amounted to a total of $61,168.49, in addition to the $1,000 in liquidated damages that defendant

[1] Plaintiffs filed their complaint approximately a year and a half after their correspondence with defendant.

was contractually obligated to pay for any default.[2] We note that plaintiffs' brief in their motion for reconsideration and their appellate brief state that defendant only owes them $4,508.35 in late charges.[3]

On November 17, 1999, plaintiffs moved for summary disposition pursuant to MCR 2.116(C)(9) and (10). In a written opinion, the trial court found that there was no dispute that defendant paid plaintiffs $63,080.00 in additional compensation under the contract rider. The trial court further stated that plaintiffs drafted the contract language and that any ambiguities must be construed in defendant's favor. As such, the trial court found "that neither the original land contract nor the rider thereto specified a firm deadline by which the additional compensation was due." Because there was no firm payment date, the trial court held that defendant's payment was timely and that both the late charges and liquidated damages were unwarranted.

The trial court also found no merit to plaintiffs' contention that defendant used the incorrect square footage to ascertain the property's value. Rather, the trial court stated "that the original land contract, as drafted by plaintiffs, set forth 3,900 square feet as the total footage of the subject property." For this reason, the trial court dismissed plaintiffs' argument that defendant owed them an additional $12,059.13. The trial court granted summary disposition for defendant pursuant to MCR 2.116(I)(2). Plaintiffs' subsequent motion for reconsideration was denied by the trial court.

We review a trial court's grant or denial of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Upon review, this Court determines "whether the pleadings show that a party was entitled to judgment as a matter of law or whether affidavits or other documentary evidence showed that no genuine issue of material fact existed." *Husted v Auto-Owners Ins Co*, 213 Mich App 547, 551; 540 NW2d 743 (1995). This evidence is viewed in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

The primary concern in this appeal is the enforcement and interpretation of the parties' contract provisions. Whether contract language is clear and unambiguous is a question of law that we review de novo. *Brucker v McKinlay Transport, Inc*, 225 Mich App 442, 447-448; 571 NW2d 548 (1997). However, if contract language is ambiguous or subject to multiple meanings, interpretation is a question of fact reviewable for clear error. *Id.* at 448. It is a well established principle of contract law that any ambiguities in a contract will be construed against the drafter.

---

[2] Plaintiffs arrived at this number in their complaint as follows:

(a) 6% of $75,139.13 ($63,080.29 + $12,058.93) or $4,508.35 x 11 months (2-97 thru 12-97) = $49,591.85

(b) 6% of $12,058.93 or $723.54 x 16 months (1-98 thru 4-99) = $11,576.64

(c) $49,591.85 + $11,576.64 = $61,168.69

[3] In these briefs, plaintiffs apparently calculated the late fee once, based on the total amount of the additional compensation owed, as opposed to making it a monthly fee.

Brauer v Hobbs, 151 Mich App 769, 774; 391 NW2d 482 (1986).

Plaintiffs first argue that, contrary to the contract's plain language, the trial court erroneously insisted that 3,900 square feet be used to determine the additional compensation due plaintiffs. We agree.[4]

The contract stated that the property was "30 feet 3 inches in width by 130 feet in depth," or approximately 3,900 square feet. However, plaintiffs claim that the August 1990 City of Detroit tax bill provided the actual measurements of the property in question. This tax bill stated that the property measured 30.25 feet in width by 140 feet in depth. We note that both the contract and the tax bill stated that they referred to "Tax I.D. # 518, Ward 1."

We find that the trial court erred when it used the approximate number of 3,900 square feet as opposed to the 30 feet 3 inches by 130 feet stated in the contract. Thus, the property actually amounts to 3,932.5 square feet. However, we disagree with plaintiffs' contention that the 4,235 square feet stated in the tax bill should be used to assess the actual dimensions of the property. Plaintiffs have failed to provide any evidence that the tax bill accurately represents the square footage of the property sold to defendant. Moreover, we do not find persuasive plaintiffs' argument that the contractual language suggests the property was larger. The contract's reference to "and part of BRUSH FARM East of and adjoining park Lots 5 and 4" is ambiguous in terms of its size and does not clearly state or imply that the subject property contained more than the square footage provided in the contract. As the contract drafters, all ambiguities are construed against plaintiffs and in defendant's favor. *Id*.

Plaintiffs further maintain that the trial court erred by permitting defendant to use a percentage of the net profits, as opposed to the actual consideration received from the sale. We agree.

The trial court did not specifically address this issue in its opinion other than by its use of the figures provided by defendant. However, the contract clearly states that plaintiffs are entitled to fifty percent of the consideration received by defendant in excess of the original purchase price. Defendant's seller's statement listed the total consideration as $6,324,000.00 and the net balance due to defendant as $6,261,596.46. By using the balance due to seller/defendant, as opposed to the actual consideration received, defendant sought to deduct the taxes and costs of the sale before determining plaintiffs' portion of the proceeds.

Consideration is the amount paid for a promise and includes any benefits that accrue to a party of the contract. See *Smith v Maxey*, 186 Mich 151, 165; 152 NW 1011 (1915); 8 Michigan Law & Practice, Contracts, § 51, pp 83-84. Moreover, "consideration for a promise may inure to one other than the promisor." 8 Michigan Law & Practice, Contracts, § 66, p 97. In this case, we find that defendant benefited from the deduction of the sale's associated expenses out of the total consideration. As such, the trial court erred when it failed to use the total consideration of

---

[4] We note that neither party has provided this Court with a copy of the deed to the property or the property's title insurance. Therefore, our review is limited to the parties' contract, their correspondence, and a 1990 city tax bill.

$6,324,000.00 to ascertain the per square foot value of the property.

Lastly, plaintiffs claim that the trial court erred when it failed to find that a due date was provided in the contract. We disagree.

After carefully reviewing the contract, we find no reference to a date or time frame when the additional compensation would be due plaintiffs as a result of defendant selling the subject property. Moreover, we find that defendant paid plaintiffs the additional compensation within a reasonable time. Plaintiffs received defendant's payment within thirty days of their request and well before the expiration of the contract's clause.[5] Plaintiffs claim that the statement "then, and in such event" means payment is due on the date of resale. We disagree. This language is ambiguous at best.

We affirm in part and reverse in part. We remand to the trial court for a judgment consistent with this opinion. We do not retain jurisdiction.

/s/ Jessica R. Cooper
/s/ Mark J. Cavanagh
/s/ Jane E. Markey

[5] Contrary to plaintiffs' assertion, there was no requirement in the land contract that defendant was required to notify plaintiffs of a sale.