STATE OF MICHIGAN

COURT OF APPEALS

S. J. WISINSKI AND COMPANY,

Plaintiff-Appellant,

v

SALLY WOLF CO., LLC,

Defendant-Appellee.

UNPUBLISHED
October 11, 2002

No. 233128
Kent Circuit Court
LC No. 00-003266-CK

Before: Fitzgerald, P.J., and Holbrook, Jr. and Cavanagh, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's grant of summary disposition in defendant's favor in this breach of contract action regarding the payment of commission arising from a real estate listing agreement. We affirm.

In July of 1999, the parties entered into a Sales Agency Agreement whereby defendant granted plaintiff the right to list and lease property owned by defendant. The Agreement included a brokerage fee provision with regard to a build-to-suit transaction that provided, in pertinent part:

> Seller/Lessor agrees that if, during the listing period or within 6 months of the expiration of this listing agreement, a lease, sale or building job is consummated on the listed property with any prospective purchaser(s)/lessee(s) who were introduced to or provided information regarding the property by me or another member of the MLS during the listing period of time, a brokerage fee of 5.5% of gross monies (or other form of consideration) received from said prospective purchaser/lessee is due and payable at closing of transaction or execution of lease.

Thereafter, a potential lessee, Get-Em-N-Go Ltd (GENG), executed a Preliminary Agreement to Lease the property, which defendant rejected with a counteroffer that was rejected through GENG's counteroffer.

At some subsequent time, however, a document titled "Lease" was drafted. The purported lease is not dated and is incomplete in that it references exhibits that were not attached to the document. The exhibits apparently were to depict the premises, including the land and planned building and improvements, that was to be the subject of the lease agreement, as well as a preliminary title report. A representative of defendant executed the document on November

19, 1999, and a representative of GENG executed the document on November 18, 1999. On or about November 29, 1999, plaintiff forwarded a Broker Fee Statement dated November 24, 1999, to defendant's representative. The Statement indicated that the fifteen-year lease, which was to "commence upon completion of build-to-suit," generated a lease price of $1,229,475, yielding a brokerage fee and "balance due and payable upon lease execution" of $62,621. At some time, defendant's representative executed the Statement. Ultimately, however, negotiations between defendant and GENG ceased and the project was abandoned.

On March 31, 2000, as a consequence of defendant's failure to render the brokerage fee, plaintiff commenced this breach of contract action. Following the parties' filing of cross-motions for summary disposition, pursuant to MCR 2.116(C)(10), the trial court entered an opinion and order granting defendant's motion, dismissing plaintiff's action. The trial court held that plaintiff was not entitled to a commission because defendant and GENG did not enter into a valid and binding lease. The purported "lease" did not include the referenced exhibits related to the plans and specifications of the build-to-suit building and premises nor did plaintiff claim, or provide evidentiary support for the proposition that, such exhibits even existed. Consequently, the court held that, consistent with *Hansen v Catsman*, 371 Mich 79; 123 NW2d 265 (1963), essential terms of the contract were still open to negotiation thus an enforceable contract did not exist between defendant and GENG. Plaintiff's motion for reconsideration was denied and this appeal followed.

First, plaintiff argues that defendant and GENG entered into a valid and binding lease; therefore, it is entitled to its brokerage fee in accordance with the Sales Agency Agreement between plaintiff and defendant. We disagree. This Court reviews the grant or denial of a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). If the documentary evidence, considered in a light most favorable to the nonmoving party, fails to establish a genuine issue of material fact, the movant is entitled to judgment as a matter of law. *Id*.

Typically, "[a] broker becomes entitled to his commission whenever he procures for his principal a party with whom he is satisfied and who actually contracts for the purchase of the property at a price acceptable to the owner . . . ." *Rice-Wray v Palma*, 216 Mich 324, 328; 185 NW 841 (1921), quoting *Fuday v Gill*, 195 Mich 613; 161 NW 900 (1917) (citations omitted). Consistent with that tenet, as well as the Sales Agency Agreement, plaintiff claims entitlement to a broker's commission on an alleged lease executed between defendant and GENG. However, a lease conveys an interest in land and thus, to be binding, it must demonstrate a meeting of the minds regarding the essential terms of the transaction. See *Grant v Detroit Ass'n of Women's Clubs*, 443 Mich 596, 605; 505 NW2d 254 (1993); *Zurcher v Herveat*, 238 Mich App 267, 279, 282; 605 NW2d 329 (1999). The material terms of the agreement must be sufficiently certain and definite and include the identities of the parties, property, and consideration. *Id*. at 290-291.

In this case, the trial court held that plaintiff was not entitled to commission because the lease between defendant and GENG failed. In particular, it was not binding because the description of the premises to be leased was fatally deficient, i.e., the lease did not contain any details regarding the building to be constructed in conformity with this build-to-suit lease. We agree. Article 1 of the purported lease provides:

> Landlord hereby leases to Tenant (a) that certain building to be built at 1325 28th Street, S.W., Wyoming, Michigan (the "Building"), (b) the land described on Exhibit A-1 attached hereto (the "Land") and (c) the right of ways, ingress and egress and other areas and rights appurtenant to the Land and benefiting the Building (all of which are collectively hereinafter referred to as the "Premises"), all as depicted on Exhibit A. The Building is presently planned to have approximately ____ square feet (__' x __') of floor area. The Land contains approximately 28,800 square feet of land. Landlord represents and warrants that Exhibit A is a complete and accurate representation of the building, parking areas, access roads, loading docks, passageways and other areas and facilities, and improvements shown thereon, planned for the Premises.

Article 6 of the purported lease provides, in pertinent part:

> Landlord shall deliver to Tenant the Premises constructed in conformity with requirements described in Plans and Specifications (hereinafter defined). Tenant shall, at its sole cost and expense, prepare three (3) sets of detailed plans and specifications for construction of the Building and the related on and offsite improvements in accordance with Exhibit A and Tenant's criteria drawings and specifications identified on Exhibit B ("Tenant's Plans").

However, the referenced exhibits, A, A-1, and B, which would have described the property that was the subject of the alleged build-to-suit lease, i.e., the building, land, and premises, do not exist.

Relying on *Brodsky v Allen Hayosh Industries, Inc*, 1 Mich App 591; 137 NW2d 771 (1965), plaintiff claims that the street address referred to in the purported lease is a sufficient property description. However, in *Brodsky* the parties entered into a build-to-suit preliminary agreement for the construction and lease of "a factory building containing approximately 14,400 square feet of factory space, and 1,100 square feet of air-conditioned offices, according to plans and specifications to be attached to the lease when executed . . . ." In reliance on that agreement, the plaintiff proceeded to prepare the land for the construction. Thereafter, the defendant informed the plaintiff that it would not comply with the agreement and alleged that the contract was not binding because the building specifications were not attached to the lease. This Court held that the agreement was sufficient because it specified the amount of factory and air-conditioned office floor space and implied "a physical plant reasonably suited to defendant's manufacturing and office needs." *Id*. at 596.

Plaintiff's reliance on *Brodsky* is misplaced; that case is factually distinguishable. Here, there is no description of the building, floor space, or premises. We agree with the trial court that the facts of this case are more similar to those in *Hansen*, *supra*. There, the parties entered into a preliminary agreement to build and lease a drugstore and approximate dimensions were set forth while reference was made to plans, specifications, and designs that were not formalized. The *Hansen* Court held that the lack of formalized plans "left, perhaps, the most significant feature of the venture open for further discussion and negotiations." *Id*. at 83.

Here, the purported build-to-suit lease, through article eight, grants the tenant the right to use the property for any lawful use but fails to disclose the intended specific use and fails to

contain any description, or even approximate dimensions, of the proposed building and associated premises. These facts support the conclusion that these material terms were subject to further discussion and negotiation. The uncertain and indefinite state of the contract is also confirmed by the fact that the purported lease was not dated and by the subsequent conduct of the parties in that no work was performed toward the fulfillment of the build-to-suit condition of the lease. In sum, the description of the property was inadequate to support an enforceable lease; therefore, the trial court properly held that plaintiff was not entitled to a brokerage fee.

Next, plaintiff argues that the trial court's grant of defendant's motion for summary disposition was premature because discovery was still pending. Generally, a motion under MCR 2.116(C)(10) should not be granted if discovery on a disputed issue is not complete. See *Colista v Thomas*, 241 Mich App 529, 537; 616 NW2d 249 (2000). Here, however, plaintiff has failed to persuade us that summary dismissal was premature. Plaintiff has not demonstrated that further discovery had a fair chance of establishing that a valid lease existed between defendant and GENG. See *id*. at 537-538.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, Jr.
/s/ Mark J. Cavanagh