STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOEL EDWARD FREEDLAND,

Defendant,

and

INTERNATIONAL FIDELITY INSURANCE COMPANY,

Appellant,

and

AUDREY FREEDLAND,

Intervening Appellee.

UNPUBLISHED
November 1, 2002

No. 231855
Wayne Circuit Court
LC No. 83-002469

Before: Saad, P.J., and Smolenski and Owens, JJ.

PER CURIAM.

International Fidelity Insurance Company appeals as of right from the trial court's order of a judgment of forfeiture on a surety bond in the amount of $50,000. We affirm.

On February 5, 1987, defendant was convicted of one count of conspiracy to commit Medicaid fraud, MCL 400.606, and twenty-two counts of Medicaid fraud, MCL 400.607. The trial court sentenced defendant to five to ten years' imprisonment for the conspiracy conviction, and two to four years' imprisonment on each of the Medicaid fraud convictions. Thereafter, the trial court granted defendant's motion for an appeal bond in the amount of $50,000. International Fidelity, through its local bonding agent, Goldfarb Bond Agency, issued the appeal bond.

Defendant appealed his conviction to the Court of Appeals and this Court affirmed defendant's conviction in a published opinion, *People v Freedland*, 178 Mich App 761; 444

NW2d 250 (1989). The Michigan Supreme Court denied defendant's application for leave to appeal. Thereafter, defendant filed a motion for bond pending petition for certiorari to the United States Supreme Court and the trial court granted the motion. However, the United States Supreme Court denied defendant's petition for certiorari.

Defendant failed to appear to begin serving his sentence and the court entered a capias and judgment which ordered defendant to appear before the court on October 29, 1990. At the same time, the court entered an ex parte judgment against International Fidelity. Almost seven years later, on October 1, 1997, the court entered a second capias and judgment and once again ordered defendant to appear to serve his prison sentence, and renewed the judgment against International Fidelity. On September 22, 1999, the trial court issued a third capias and judgment, and renewed the judgment against International Fidelity. On September 30, 1999, International Fidelity's agent, Charles Goldfarb, was served with a copy of the September 22, 1999 capias and judgment.

International Fidelity argues that the bond forfeiture was improper under *Kondzer v Wayne Co Sheriff*, 219 Mich App 632; 558 NW2d 215 (1996). Specifically, International Fidelity argues that it was not bound by the unilateral condition imposed without its consent when the trial court allowed defendant to remain free on bond following the Michigan appeals process. International Fidelity further argues that, because there was an additional risk of flight, the trial court should not have extended the bond without its consent or a new bond.

A surety bond is a contract between the government and the principal and the surety. *Kondzer, supra* at 634. The interpretation of a contract is a question of law which we review de novo. *Henderson v State Farm Fire and Cas Co*, 460 Mich 348, 353; 596 NW2d 190 (1999). The goal in the interpretation of contracts is to honor the intent of the parties. *Mikonczyk v Detroit Newspapers, Inc*, 238 Mich App 347, 349-350; 605 NW2d 360 (1999). To that end, the court must look at the contract language to discern the intent of the parties. *UAW-GM v KSL Recreation Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998). Contractual language must be construed according to its plain and ordinary meaning, and technical or strained constructions should be avoided. *Id*. at 491-492.

Contrary to International Fidelity's argument, *Kondzer, supra*, is not controlling in this case. In *Kondzer*, the plaintiff signed a bail bond that included five written conditions and a clause which stated that "if all the terms and conditions of [the] bond are not met, the full amount of the bond may be forfeited." *Kondzer, supra* at 636. At the defendant's preliminary examination, the district court added a condition to the defendant's release that he have no contact with the complaining witness, which the defendant later violated. *Id*. at 635-636. In *Kondzer*, the no-contact clause was clearly not part of the original terms of the bond to which the plaintiff agreed. The bond at issue here is an appeal bond and it provides:

> The undersigned SURETY and DEFENDANT acknowledge themselves bound unto the State of Michigan in the Penal Sum of Fifty Thousand (50,000) DOLLARS, to be levied on their property (real, personal or mixed), and to be evidenced by a judgment if default be made in the conditions following:
>
> THE CONDITIONS OF THIS RECOGNIZANCE ARE, That if the undersigned defendant shall personally appear in the RECORDER'S COURT FOR THE CITY

> OF DETROIT when and at such times as the Court shall order, and shall not depart said Court without leave thereof, then this obligation to be void, otherwise to remain in full force and effect.

International Fidelity argues that the no-contact clause in *Kondzer* is similar to the trial court's decision to allow defendant to remain free on bond following his state appeals while he appealed to the United States Supreme Court. However, unlike the situation in *Kondzer*, the trial court here did not impose a new obligation on the surety. As noted, this was an appeal bond, and the trial court merely acted in accordance with the terms of the agreement. The language of the bond indicates that defendant was required to appear before the court when ordered; this plain language indicates that defendant was required to appear both during and after the conclusion of the appeal process. If defendant's appeal efforts were unsuccessful, under the clear terms of the bond, defendant would have to appear in court to begin serving his sentence if so ordered. Furthermore, the plain language of the bond does not specify or limit the "type" of appeal. Because a plain reading of the terms of the contract are clear and unambiguous, we will not rewrite the terms of the contract to impose limits on the appeal process. *UAW-GM, supra* at 491. Accordingly, we hold that the trial court did not err when it held that a new bond was not required after the completion of the Michigan appellate process.

International Fidelity also argues that the 1990 judgment is void because the prosecutor did not give notify the surety before it was entered, in violation of MCL 765.28. International Fidelity further asserts that the 1997 and 1999 judgments are also invalid because they are based on the 1990 judgment. This Court reviews a trial court's findings of fact for clear error. MCR 2.613(C); *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001). A finding of fact is clearly erroneous if, after a review of the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made. *People v Swirles (After Remand)*, 218 Mich App 133, 136; 553 NW2d 357 (1996). However, the trial court's ultimate conclusions of law are subject to de novo review. *People v Parker*, 230 Mich App 337, 342; 584 NW2d 336 (1998). MCL 765.28 provides:

> In addition to any other method available, it is hereby provided that whenever default shall be made in any recognizance in any court of record, the same shall be duly entered of record by the clerk of said court and thereafter said court, upon the motion of the attorney general, prosecuting attorney or city attorney, may give the surety or sureties 20 days' notice, which notice shall be served upon said surety or sureties in person or left at his or their last known place of residence. Said surety or sureties shall be given an opportunity to appear before the court on a day certain and show cause why judgment should not be entered against him or them for the full amount of such recognizance. If good cause is not shown, the court shall then enter judgment against the surety or sureties on said recognizance for such amount as it may see fit not exceeding the full amount thereof. Execution shall be awarded and executed upon said judgment in like manner as is provided in personal actions.

Plaintiff and intervening-appellee, Audrey Freedland, argue that International Fidelity knew about the 1990 judgment as is confirmed by an April 1998 misrepresentation to the trial court's assistant, that the judgment was paid in 1990. On this issue, the trial court found as follows:

> Goldfarb, by affidavit, denies receipt of the October, 1990 judgment. The court file in this case shows that the judgment was entered on October 29, 1990. The file is without a proof of service, however, an attorney (Ms. Kimberly [sic] D.R. Reed) representing this court contacted Goldfarb regarding ancillary matters on the subject of the bond funds on April 27, 1998. Goldfarb informed the court's legal counsel that "in 1990, the funds involved were returned to the General Fund of the State Treasury." The reasonable inference is that Surety's agent had notice and knowledge of the 1990 judgment. There is no proof and Surety concedes that the judgment was never paid.

Because proofs of service are absent from the lower court file, notice is a question of fact. After reviewing the contents of the entire record, and comparing Goldfarb's affidavit in which he denies knowledge of the October 29, 1990 and October 1, 1997, capias and judgments, with Reed's letter discussing the 1990 judgment, we find no clear error in the trial court's conclusion. Reed's letter states that in April 1998 she was informed by someone at Goldfarb Bond Agency that "in 1990, the funds involved were returned to the General Fund of the State Treasury." The reasonable inference arising from the letter is that Goldfarb had actual knowledge of the 1990 judgment because Goldfarb represented to Reed that monies were paid in 1990 on the case, presumably on the judgment. As such, we find that International Fidelity's argument that the prosecution's evidence does not sustain the lower court's finding that surety had notice of the judgment, is without merit. Furthermore, for these reasons, the 1997 and 1999 judgments are also valid because they are based on the valid 1990 judgment.

Lastly, International Fidelity argues that the totality of the circumstances show that it was denied both due process of law and equal protection under the law. Generally, an issue must be raised before and addressed by the trial court in order to be preserved for appeal. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). This issue is not properly preserved for review on appeal because it was not raised before or addressed by the trial court. *People v Malone*, 193 Mich App 366, 371; 483 NW2d 470 (1992). Nevertheless, this Court may take notice of plain errors which affected substantial rights even if not raised before the trial court. MRE 103(d); *Grant, supra*, 445 Mich 535, 545, 553. Unpreserved claims of error are reviewed by this Court for plain error that affected the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). This Court may address an unpreserved issue if it is one of law for which all the necessary facts were presented. *Panian Chevrolet v Young*, 239 Mich App 227, 233; 608 NW2d 89 (2000).

Equal protection of the law is guaranteed by both the federal and Michigan Constitutions, US Const, Am XIV; Const 1963, art 1, § 2; *Frame v Nehls*, 452 Mich 171, 183; 550 NW2d 739 (1996). The purpose of the equal protection guarantee is to secure every person "against intentional and arbitrary discrimination, whether occasioned by the express terms of a statute or by its improper execution." *Village of Willowbrook v Olech*, 528 US 562, 564; 120 S Ct 1073; 145 L Ed 2d 1060, 1063 (2000). Furthermore, no person may be deprived of life, liberty or property without due process of law. US Const, Am V; Const 1963, art 1, § 17; *Tolksdorf v Griffith*, 464 Mich 1, 7; 626 NW2d 163 (2001). Due process generally requires notice and an opportunity to be heard. *Dusenbery v United States*, 534 US 161; 122 S Ct 694, 699; 151 L Ed 2d 597 (2002). Notice must be "reasonably calculated" to apprise interested parties of the pendency of the action and must afford them an opportunity to present objections. *Id.*, 701;

Vincencio v Jaime Ramirez, MD, PC, 211 Mich App 501, 504; 536 NW2d 280 (1995). Actual receipt of the notice is not required. *Dusenbery, supra*, 122 S Ct 701. Also, some form of hearing is required before the deprivation of a property interest. *Dow v State*, 396 Mich 192, 205; 240 NW2d 450 (1976); *Brandon Twp v Tomkow*, 211 Mich App 275, 282-283; 535 NW2d 268 (1995).

International Fidelity argues that it was denied due process of law and equal protection under the law when the court unilaterally extended the bond at issue without first getting surety's consent. International Fidelity also maintains that it was denied due process of law and equal protection under the law because it was not notified of the 1990 judgment and, as a result, was denied the right to be heard before forfeiture of the bond. Because we found that the trial court did not err when it held that a new bond was not required after the completion of the Michigan appellate process, this claim is without merit. Surety has not shown that the court intentionally and arbitrarily discriminated against it in violation of the equal protection guarantee. *Village of Willowbrook, supra*, 528 US 564. Also, International Fidelity's argument is meritless because actual receipt of the notice is not required and because we found that Goldfarb knew about the judgments, and thus, received proper notice of his opportunity to be heard by the court. *Dusenbery, supra*, 122 S Ct 701. Therefore, in light of these rules, together with the fact that surety did not develop this argument in the lower court or on appeal, surety's constitutional arguments fail and reversal is not warranted. *Carines, supra*, 460 Mich 763.

Affirmed.

/s/ Henry William Saad
/s/ Michael R. Smolenski
/s/ Donald S. Owens