

STATE OF MICHIGAN
COURT OF APPEALS

LEE SITTO,

Plaintiff-Appellant,

v

KHALIL AYOUB and RAJAH AYOUB,

Defendants-Appellees.

UNPUBLISHED

January 27, 2004

No. 241629

Wayne Circuit Court

LC No. 00-012008-CK

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

PER CURIAM.

Plaintiff appeals by right the trial court's order denying his motion for summary disposition and granting the motion for summary disposition filed by defendants. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

In August 1998 the parties entered into an agreement for the purchase of real property. Plaintiff paid defendants a deposit of \$10,000. An addendum to the purchase agreement allowed plaintiff a thirty-day period in which to conduct due diligence and provided that if within the thirty-day period plaintiff notified defendants in writing that he was terminating the purchase agreement he would be entitled to a full refund of his deposit. Plaintiff forfeited the deposit when he did not complete the transaction and did not notify defendants in writing of his intention to terminate the purchase agreement.

On February 25, 1999 the parties entered into an amendment to the purchase agreement. The amendment stated that "[e]xcept only as expressly modified by the terms and conditions of this Amendment," the terms and conditions of the purchase agreement and the addendum would remain in full force and effect. The amendment extended plaintiff's due diligence period for six months, and required him to pay defendants an initial deposit of \$25,000 and \$5,000 for each month in which the transaction was not completed. The amendment provided that "[n]otwithstanding anything in the Agreements and this Amendment to the contrary, all amounts paid by Purchaser to Seller in connection with the Agreements and this Amendment (excluding the monthly \$5,000 payment) shall be deemed Purchaser's good faith deposit and shall be fully refundable to Purchaser in the event the parties do not consummate the transactions contemplated in the Agreements and this Amendment." Plaintiff paid defendants a deposit of \$25,000 and made six monthly payments of \$5,000. The parties did not complete the transaction, and plaintiff did not provide defendants with written notice of his intention to terminate the purchase agreement. Defendants refused to refund plaintiff's deposit.

Plaintiff filed suit alleging that the deposit should have been refunded because the parties did not complete the transaction. Both parties moved for summary disposition pursuant to MCR 2.116(C)(10). Plaintiff asserted that the language of the amendment was unambiguous and clearly stated that the deposit of \$25,000 was to be refunded if the transaction was not completed. Plaintiff contended that the amendment did not require him to give written notice of his intention to terminate the agreement. Defendants countered that the amendment stated that except as otherwise specified, the terms and conditions set out in the purchase agreement and the addendum remained in full force and effect, and asserted that the amendment did not change the provision in the addendum that entitled plaintiff to a refund of his deposit only if he gave written notice of his intention to terminate the purchase agreement. The trial court denied plaintiff's motion and granted defendants' motion, concluding that no language in the amendment eliminated the requirement that plaintiff was required to give written notice of his intention to terminate the purchase agreement.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001). We also review as a question of law whether the language of a contract is ambiguous and requires resolution by the trier of fact. *Mahnich v Bell Co*, 256 Mich App 154, 159; 662 NW2d 830 (2003). A court may not create an ambiguity where none exists. *Id.* Rather, an unambiguous contract must be enforced according to its terms. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51; 664 NW2d 776 (2003).

When parties enter into several agreements relating to the same subject matter, the intention of the parties must be ascertained from all the agreements. If a subsequent agreement completely covers the subject matter and contains terms that are inconsistent with the prior agreement, and the two agreements cannot stand together, the later agreement supersedes the prior agreement. *Omnicom of Michigan v Giannetti Investment Co*, 221 Mich App 341, 346-347; 561 NW2d 138 (1997).

Plaintiff argues that the trial court erred by denying his motion for summary disposition and granting the motion filed by defendants. He emphasizes that the amendment clearly stated that "notwithstanding" any other provision in the amendment or the earlier documents, the deposit of \$25,000 was to be refunded in the event the parties did not complete the transaction. The amendment did not require that written notice of termination of the purchase agreement be provided in order for the deposit to be refundable. We disagree and affirm the trial court's decision.

The amendment provided that the terms and conditions stated in the purchase agreement and addendum remained in effect unless they were "expressly modified" by the terms of the amendment. The amendment specifically extended the due diligence period for an additional six months, required plaintiff to pay an additional deposit in the amount of \$25,000, and required him to pay defendants \$5,000 for each month in which the transaction was not completed. The amendment provided that "notwithstanding" any other provision in any document, the \$25,000 deposit was fully refundable in the event the parties did not complete the transaction. The amendment clearly stated that plaintiff was entitled to a refund of his deposit if the parties did not consummate the transaction, but made no reference to any method he was required to utilize to notify defendants that he intended to terminate the purchase agreement. No terms of the amendment expressly modified the notification requirement contained in the addendum. The

amendment did not contain provisions regarding notification that were inconsistent with those in the purchase agreement and addendum; therefore, the intention of the parties must be ascertained from all the agreements. The addendum to the purchase agreement provided that plaintiff was required to give defendants written notice of his intention to terminate the transaction, and that if he did not do so, he forfeited the right to a refund of his deposit. Plaintiff did not give defendants written notice of his intention to terminate the purchase agreement. The trial court correctly concluded that the amendment did not eliminate the requirement that plaintiff provide written notice of his intention to terminate the purchase agreement in order to be entitled to a refund of his deposit. *Id.* The trial court properly denied plaintiff's motion for summary disposition and granted defendants' motion.

Affirmed.

/s/ Jessica R. Cooper

/s/ Patrick M. Meter