STATE OF MICHIGAN

COURT OF APPEALS

ABRAHAM KRISPIN,

Plaintiff-Appellant,

v

DONALD FOSTER, ANNE TILLIE WATKINS, and TRANSNATION TITLE INSURANCE CO. f/k/a TRANSAMERICA TITLE INSURANCE CO.,

Defendants-Appellees.

UNPUBLISHED
February 5, 2004

No. 239545
Oakland Circuit Court
LC No. 00-020720-CH

Before: O'Connell, P.J., and Jansen and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment quieting title to a disputed parcel of property in favor of defendant Donald Foster. We reverse and remand for a new trial.

In November 1978, defendant Donald Foster and Olga Mazurek, mother of codefendant Anne Tillie Watkins, entered into a lease agreement. The lease agreement did not contain a legal description of the property. It merely contained an address on Auburn Road. Defendant Foster used the property to operate his business, known as Suburban Glass of Rochester. In the course of operating his business, defendant Foster made use of a garage located near the business. In 1980, defendant Foster entered into a land contract with defendant Watkins and her brothers, Walter T. Mazurek and Roman Henry Mazurek. The land contract contained a legal description of the property with reference to recorded plats, degrees, and footage. The contract did not delineate the structures that were included in the sale.

In 1982, Walter Mazurek, with his attorney, went before the then Avon Township (now Rochester Hills) Zoning Board of Appeals to request a variance. Mazurek sought to split the Suburban Glass Company from the Mazurek parcel. The Mazurek property consisted of a residence plus an apartment building with a garage attached to the apartment building. The garage was the one utilized by defendant Foster in his business. A zoning variance was necessary because the proposed split of the property lines would cause half of the apartment building to be zoned B-1 and the other half of the apartment building to be located on R-4 zoning. Furthermore, a small unusable piece of B-1 property would be located behind Suburban Glass. The meeting minutes indicated that two variances were granted subject to the conveyance of the northerly 49.69 feet of the subject parcel to Suburban Glass. In January 1983, the deputy

director of the department of assessing for Avon Township sent notice to defendant Foster of the breakdown in value and tax dollars of his interest and the interest of the Mazureks.

Despite the fact that the granted variances were conditioned upon the conveyance of property to Suburban Glass, the conveyances never occurred. Additionally, when the property was split, the legal description did not evenly divide the structures on the property. Specifically, a portion of the apartment building located on the Mazurek property was contained in the disputed parcel of land (49.96 x 123.70 feet), and never deeded to defendant Foster.

In 1985, the Mazureks and defendant Watkins filed an action in circuit court for equitable reformation of the land contract. It was alleged that, based on the representations during the sale, a 12% interest rate would be charged on the unpaid balance. It was subsequently learned that this rate was usurious, and the interest rate should have been 11%. Consequently, reformation of the land contract to reflect this interest rate was requested. In response, defendant Foster filed a counter complaint. Therein, defendant Foster sought to strike the usurious interest rate, pay the balance of the land contract in full, and receive a warranty deed to the property. The parties reached a settlement, and there is no indication that either party raised the issue of the outstanding conveyance of land. Moreover, there is no indication that defendant Foster received a warranty deed at that time.

In 1994, plaintiff entered into a purchase agreement with Walter Mazurek and defendant Watkins[1] purportedly for the remainder of the Mazurek property. The purchase agreement was originally prepared with reference to a legal description and the address "2384 Auburn Road." Walter Mazurek's daughter and the niece of defendant Watkins, Carol Mazurek, acted as a notary public, and certified that this document was a true and correct copy of the original. However, the original document as retained by the real estate agent, Robert Gauthier, contained the following with regard to the description of the property:

> See Attached legal Description
>
> Item No. 15-29-452-029
>
> Also known as 2384 Auburn Road, a house and 2370 Auburn Road, an apartment building

The initials of Walter Mazurek and defendant Watkins appeared next to this additional description.

After plaintiff purchased the property, a dispute arose regarding the ownership of the garage. Defendant Foster had continued to utilize the garage over the years. Defendant Foster asserted that plaintiff, without contact or warning, broke a lock on the garage and began to remove his property, prompting him to call police. However, plaintiff asserted that the garage was part of the land purchased from Walter Mazurek and defendant Watkins. It was learned that

[1] Roman Mazurek was deceased at the time of this sale.

neither purchase agreement contained a legal description of the property covering the garage and a portion of the apartment building. In 1995, defendant Foster sued Walter Mazurek in district court to recover the property taxes that he had paid for the disputed parcel that included the garage. He obtained a judgment against Mazurek, and a satisfaction of judgment was filed in 1996. Defendant Foster did not make a claim to the property at that time.

A series of communications occurred between the parties and Rochester Hills authorities in an attempt to resolve the land dispute and determine the proper party for payment of the taxes on the disputed parcel. In 1997, counsel for defendant Foster sent a letter to plaintiff asserting that two of the four apartment units were located on defendant Foster's land. It was requested that the units be removed forthwith. Additionally, an undated letter with a survey[2] was sent by Walter Mazurek and defendant Watkins to Rochester Hills authorities asserting that the disputed parcel had been sold to plaintiff coupled with a request for correction of the boundaries. In 1999, a tax bill for the disputed parcel was sent to defendant Watkins. In response, Carol Mazurek sent a copy of the 1994 contract of sale involving plaintiff to the city assessor. In written correspondence, Carol Mazurek represented that "a long, long time ago," the assessor's office granted defendant Foster a portion of land that was not sold or deeded to him. The letter continued:

> We even went to Court over the matter and it was judged we pay the back taxes which we did and [defendant] Foster and Krispin [plaintiff] were to get their properties straightened out. So this portion of land belongs to [plaintiff] and I emplore [sic] you to get the taxes paid [sic] to the right parties.
>
> We have endured enough losses to this matter and refuse to put up with anymore. When [plaintiff] purchased the property, he was given a credit of $500.00 towards the purchase of a Survey. He did not get one. This Tax bill is on land which apartment buildings stand.
>
> If I can be of anymore assistance, please call me.
>
> /s/ Carol C. Mazurek

In response to the correspondence, the Rochester Hills assessor contacted Carol Mazurek, a longtime employee of the Transnation Insurance Company. After that communication, Carol Mazurek sent the following letter to defendant Foster's attorney with a copy of a proposed warranty deed:

> After receiving the split tax bill for the above parcel from the City of Rochester Hills I immediately contact [sic] the Assessor.

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[2] A survey involved in the 1980 sale could not be located, and it is unclear if a survey was prepared. Plaintiff testified that a survey did not occur during the 1994 sale because of time constraints.

> He then phoned me and per his conversation, and later follow up with documentation showing me that this parcel was never conveyed to [plaintiff] by sale of Land Contract, as I thought had occurred, and therefore, the land in question could not be transferred to [defendant] Foster. But now it is all clear to me what had happened years ago. If you had responded at the end of the last court date, when [defendant] Foster was awarded the payment of taxes; but [defendant] Foster was to correct the legal description at that time, the situation could have been resolved back then. Waiting years after and thinking that you will gain more retribution is not acceptible [sic].
>
> I have enclosed a copy of the proposed Warranty Deed to convey said parcel. My Aunt [defendant Watkins] is the only surviving individual who can sign the Deed and she is hard to explain a situation to, but I will do my best to get this done. I only wish I had gotten involved in this long ago.
>
> However, please call me … and let me know if this Deed will satisfy the situation.

Ultimately, on December 12, 1999, Carol Mazurek served as a witness to and the notary public on the warranty deed from her aunt, defendant Watkins, to defendant Foster. The warranty deed expressly provided that it was prepared by Carol Mazurek of Transnation Title. The property was conveyed for the sum of $1.00 and described as follows:

> Land in the City of Rochester Hills, Oakland County, Michigan, described as follows:
>
> Part of Lot(s) 23 of SUPERVISOR'S PLAT NO. 9, according to the plat thereof recorded in Liber 59 of Plats, page(s) 13 of Oakland County records, described as follows: Beginning at the Southeast Lot corner, thence South 84 degrees 35 minutes 00 seconds West, 123.70 feet; thence North 02 degrees 38 minutes 50 seconds West, 179.96 feet; thence North 84 degrees 35 minutes 00 seconds East, 123.70 feet; thence South 02 degrees 38 minutes 50 seconds East, 179.96 feet to the point of beginning, EXCEPT, beginning at the Southeast Lot corner, thence South 84 degrees 35 minutes 00 seconds West, 123.70 feet; thence North 02 degrees 38 minutes 50 seconds West, 130.00 feet; thence North 84 degrees 35 minutes 00 seconds East, 123.70 feet; thence South 02 degrees 38 minutes 50 seconds East, 130.00 feet to the point of beginning.

Now, with title to the disputed parcel through the warranty deed provided by Carol Mazurek, counsel for defendant Foster sent a letter to plaintiff advising him that two of the four unit apartments were located on defendant Foster's property. If evidence of title to these two units was not provided by plaintiff by the end of the month, it would be assumed that plaintiff consented to the demolition of the units. The letter further advised plaintiff that since the city would surely require demolition of the remaining units, he may wish to sell a strip of the

property to defendant Foster. Plaintiff then filed this litigation to quiet title to the disputed parcel of property.[3]

At the commencement of the bench trial,[4] the trial judge repeatedly questioned why the parties were unable to settle the litigation in light of the condition of the garage, the time involved in presenting the case, and the costs involved. The judge further advised that if the trial proceeded, one party ultimately would not be happy with the outcome, and an appeal would further delay resolution of the case and increase costs. At that time, the trial court learned that if the disputed parcel including the garage were awarded to defendant, defendant would not require the division of the apartments. The following was stated on the record:

> THE COURT: If I were to decide that Parcel B [the disputed parcel], in favor or [sic] your client [defendant Foster], that Parcel B belongs to your client, we could *fashion* –
>
> DEFENSE COUNSEL: The rear of the garage is the new line. [Emphasis added.]

At trial, the parties presented the various documents evidencing the sale of the different parcels of land. The parties also brought in testimony to delineate the circumstances underlying the property transfers, plaintiff's viewing of the property with the real estate agent that included the garage, and the contradictory positions and explanations for any change in position by witnesses in documentation designed to resolve the ownership and tax issues. The trial court continued to question why all of the background information was necessary. On the second day of trial, the judge again urged the parties to settle the litigation.

The testimony of three witnesses is particularly noteworthy. Defendant Watkins testified that it was her intent to convey the disputed parcel of property to plaintiff. However, she received advice from her niece, Carol Mazurek, that if she did not convey the property to defendant Foster, Watkins would be responsible for the property taxes. Consequently, Watkins signed the warranty deed for the disputed parcel for the benefit of defendant Foster. Carol Mazurek acknowledged attending the 1994 closing of the land contract with plaintiff. In fact, Carol Mazurek served as both a witness and the notary public for the document. She testified that the residential home and the apartment building were included in the sale. With regard to

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[3] Plaintiff named Watkins as a defendant. In her answer to the complaint, Watkins requested that the court deny plaintiff's request for relief. However, in response to defendant Foster's request for admissions found in the lower court file, defendant Watkins stated, with respect to the 1994 land contract with plaintiff, that "the original intent was that Abraham Krispin was to recive [sic] the house and apartments, which included the 'garage'". Defendant Watkins also gave this same testimony, although counsel for defendant Foster was able to obtain contradictions in her testimony with regard to the level of her role in and knowledge of the agreement. Thus, the allegation, that defendant Watkins is taking a position contrary to that raised at trial and requiring the filing of a cross appeal, is without merit.

[4] The parties agreed to waive the previously requested jury trial.

the garage, she opined that "part" of the garage was included in the sale. Carol Mazurek testified that, through her employment with the title insurance company, she was aware that conveyances of land were accomplished by deeds. She was unaware of the existence of any deed to defendant Foster with respect to the garage before 1999. Carol Mazurek testified that she did not like plaintiff. Carol Mazurek admitted telling defendant Watkins that if she did not sign the warranty deed, Watkins would be responsible for the property taxes. There is no indication that Carol Mazurek gave defendant Watkins the option of signing a warranty deed to the disputed parcel in favor of plaintiff to avoid having to pay the taxes. Despite this lack of information, Carol Mazurek denied that she made a choice as to who should receive the disputed property based on her contact with defense counsel and preparation of the warranty deed.

Although defendant Foster received title to a parcel of property, he did not ensure that the conditions for rezoning the property occurred. The nature of the transaction, land contract, was one which required monthly payments to the Mazureks and defendant Watkins. Thus, contact between the parties continued. In 1985, a lawsuit to reform the interest rate was filed, but there was no litigation to compel the conveyance of the disputed parcel. After learning of the claim raised by plaintiff, defendant Foster did not seek reformation of the contract of sale, but filed suit to recoup the taxes he paid on the disputed parcel.

The trial court noted that a document evidencing the conveyance of the disputed parcel did not occur until the warranty deed was executed in late 1999. The judge further concluded that the 1980 and 1994 land contracts to defendant Foster and plaintiff, respectively, were clear on their face and did not include the disputed parcel. Therefore, parol evidence of the intent to convey the disputed parcel could not be considered. Despite the rejection of parol evidence with regard to the 1980 and 1994 land contracts, the trial court noted that defendant Watkins testified that she knowingly signed the 1999 warranty deed at the urging of Carol Mazurek to avoid the responsibility of payment of property taxes. Therefore, the conveyance was legal and valid to defendant Foster. The trial court then noted that a problem arose because the property dimension and location of the disputed parcel cut though a portion of plaintiff's apartments. To resolve that controversy, the trial court exercised its equitable powers to draw the property line south of the apartment wall.

This Court reviews a trial court's decision in an action to quiet title de novo. *Killips v Mannisto*, 244 Mich App 256, 258; 624 NW2d 224 (2001). A trial court's findings of fact in a bench trial are reviewed for clear error, but conclusions of law are reviewed de novo. *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001). A finding is clearly erroneous where, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake has been made. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). Issues of witness credibility present a question for the trier of fact, and we defer to the trier of fact's special opportunity to judge the witnesses who appear before it. *In re Clark Estate*, 237 Mich App 387, 395-396; 603 NW2d 290 (1999). In quiet title actions, the plaintiff bears the burden of establishing a prima facie case of title. *Beulah Hoagland Appleton Qualified Personal Residence Trust v Emmet Co Rd Comm*, 236 Mich App 546, 550; 600 NW2d 698 (1999).

The parol evidence rule excludes evidence of prior contemporaneous agreements, oral or written, that contradict, vary, or modify an unambiguous writing intended as a final and complete expression of the agreement. *UAW-GM Human Resource Center v KSL Recreation Corp*, 228

Mich App 486, 492; 579 NW2d 411 (1998). However, where an ambiguous term is presented in a land contract, the trial court properly considers oral testimony to determine the true intent of the parties. *Keller v Paulos Land Co*, 381 Mich 355, 362; 161 NW2d 569 (1968). An ambiguous term must be strictly construed against the preparer of the contract. *Id.* Where a written instrument is uncertain and ambiguous, evidence by parol testimony is admissible to show the parties' relationship and attending circumstances as an aid in interpreting and construing the contract. *Piasecki v Fidelity Corp*, 339 Mich 328, 337; 63 NW2d 671 (1954).

Disregarding the dispute regarding the ownership of the garage momentarily, an ambiguity was presented by the 1994 land contract executed between Walter Mazurek, defendant Watkins, and plaintiff. Although the land contract contained a legal description of the property, it contained the following additional description based on addresses: "2384 Auburn Road, a house and 2370 Auburn Road, an apartment building." The two descriptions presented contradictions in terms because the address description transferred the entire apartment building without qualification. However, the legal description did not transfer the apartment building in its entirety, but rather, split the units. Because of this ambiguity in the property descriptions contained within the 1994 land contract, the trial court erred in concluding that the 1994 land contract was clear on its face and the attendant refusal to consider extrinsic evidence. *Keller, supra*. Moreover, because the garage in dispute shared a wall with the apartment building, the trial court, when considering extrinsic evidence, is then entitled to determine whether it was intended that the garage would also be transferred by the 1994 land contract.

Furthermore, extrinsic evidence is also admissible to address the intention regarding the garage because of the land contract's silence concerning its disposition. In *Stimac v Wissman*, 342 Mich 20, 23; 69 NW2d 151 (1955), the defendants constructed a building equipped with "plumbing facilities and toilet rooms" for use as a drive-in restaurant. Water was necessary to operate the restaurant, but it was not municipally furnished to the property. Therefore, the defendants ran a pipe to an adjacent property with a well in operation. One of the defendants held an ownership interest, subject to a life estate, in the adjacent property. *Id.*

The plaintiffs entered into a lease agreement to occupy the restaurant for a ten-year period. The lease was completely silent regarding water, its supply, its use, or the payment thereof. The restaurant, however, could not operate without water, and water was furnished to the premises at the time the plaintiffs began to operate the restaurant. After a dispute arose between the parties, the defendants began to utilize their control of the water supply as a "means of persuasion." The plaintiffs filed suit for injunctive relief, which the trial court granted. On appeal, the defendants asserted that, because the lease was completely silent regarding the furnishing of water, parol evidence regarding a duty to supply could not be considered. *Id*. at 23-24.

The Supreme Court rejected the defendants challenge based on silence:

> … the parties to a written agreement, which is complete in itself, may at the time of its execution, or previously, have entered into a collateral parol agreement concerning some matter on which the written instrument is silent, and the rule does not preclude the proof of such collateral agreement, provided no attempt is made to vary or contradict the writing. Any independent fact or collateral parol agreement, whether contemporaneous with or preliminary to the main contract in

> writing, may be proved, provided it does not interfere with the terms of the written contract, though it may relate to the same subject matter. . . . The rule excluding parol evidence to vary or contradict a writing does not extend so far as to preclude the admission of extrinsic evidence to show prior or contemporaneous collateral parol agreements between the parties. The general rule admitting evidence of a collateral agreement is especially applicable where such agreement operates as an inducement for entering into the written agreement.
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> ***
>
> Its application in the case at bar by the trial court was obviously proper. Since the lease was utterly silent as to water, it was competent to inquire into the circumstances surrounding the transaction. When we consider that the building was constructed and leased for the operation of a restaurant, that it was supplied with plumbing fixtures, inside toilets rather than outside privies, that water was supplied to the building at the time the business was commenced, and at the time the lease was entered into, and, finally, that a supply of water was not merely convenient but essential to the conduct of the business as obviously intended by both parties, we agree with the trial court that the parties intended that water would be furnished by the defendants. There was an implied, if not an express, collateral independent promise, not covered or attempted to be covered by the writing, to furnish water for the duration of the lease. The showing thereof conflicts in no way with the parol evidence rule. [*Id*. at 25-27 (Citations omitted).]

Applying the principles of *Stimac* to the case at bar, the 1994 land contract was silent regarding the disposition of the garage. However, the garage was attached to the apartment building. Plaintiff testified that he was recently divorced and needed to move to a location that would be capable of housing two cars and a truck. Therefore, he expressly discussed the inclusion of the garage in the land contract sale. Gauthier, the Mazurek's real estate agent, also testified that it was represented that the garage was included in the sale of the property. Furthermore, it was offered that the garage did not have its own separate address, but was attached to the apartments. Therefore, the inclusion of the apartment address was designed to address the inclusion of the sale of the garage in the land contract. The trial court refused to consider this evidence and, therefore, did not pass upon the credibility of this testimony. *In re Clark Estate, supra*. Furthermore, because the trial court refused to entertain extrinsic evidence, it did not pass upon the credibility of the intention of defendant Watkins in light of the fact that counsel for defendant Foster was able to elicit contradictions regarding the extent of her knowledge. Contradictory evidence[5] presenting questions of credibility are properly resolved by the trier of fact, *Anton v State Farm Mutual Auto Ins Co*, 238 Mich App 673, 689; 607 NW2d 123 (1999), and we do not

[5] Moreover, the trial court did not assess the contradictions or explanations involving the correspondence, actions, and testimony at trial by Carol Mazurek and defendant Foster.

resolve credibility questions anew. *Thames v Thames*, 191 Mich App 299, 311; 477 NW2d 496 (1991). Accordingly, we reverse and remand for a new trial.[6]

Reversed.

/s/ Peter D. O'Connell
/s/ Kathleen Jansen
/s/ Karen M. Fort Hood

[6] Although not dispositive, we note that defendant Foster repeatedly alleges that plaintiff did not seek reformation of the contract. However, MCR 2.118(C)(1) permits amendment of the pleadings to conform to the evidence.