STATE OF MICHIGAN

COURT OF APPEALS

GARY HUNTER,

Plaintiff-Appellant,

v

CITY OF DETROIT,

Defendant-Appellee.

UNPUBLISHED
March 16, 2004

No. 244669
Wayne Circuit Court
LC No. 98-801289-CK

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

PER CURIAM.

Plaintiff appeals as of right from the judgment of no cause of action in favor of defendant following a jury trial. We affirm.

Plaintiff purchased property located at 8443 Chalfonte in the City of Detroit. He testified that he paid taxes to the state and county for the property, but was unable to pay the taxes to defendant city because of employee incompetence. Plaintiff could not locate a city employee who could determine the amount of tax owed on the property. Plaintiff testified that he never received notices regarding delinquent taxes. Eventually, he contacted members of the city council and the mayor's staff. Ultimately, it was agreed that plaintiff would pay $5,338[1] for the property, with an initial payment of $1,338 on December 13, 1996, and the balance due no later than January 16, 1997.

An auction was held on December 17-19, 1996,[2] and plaintiff's property was purchased by James Crawford. On December 23, 1996, plaintiff received a notice of acceptance of his offer to purchase the property for $5,338. On January 1, 1997, Crawford advised plaintiff that he had purchased the property at auction. Plaintiff testified that he did not meet the January 16, 1997 deadline to pay the balance due because of the claim of Crawford. However, he later

[1] The notice of tax delinquency sent to plaintiff in November 1996, indicated that $5338 was owed to defendant. The offer to purchase indicated that the amount required for purchase was $5327 with an $11 deed recording fee.

[2] Plaintiff testified that he learned that the property was to be placed on the auction block, but could not attest how he learned that information.

attempted to pay the balance, and it was never accepted by defendant. Defendant began eviction proceedings, and plaintiff filed this litigation, seeking specific performance of the contract.

Plaintiff testified that he had spent eight years trying to resolve the tax issue with defendant and traveled from his ministry in Toronto, Canada to come to Detroit, almost on a weekly basis, because of the ongoing tax dispute. Plaintiff sought specific performance and incidental damages that included his travel costs and parking costs for approximately seventy-five trips at a rate of $1,000 per trip. Plaintiff did not produce receipts of his costs and did not provide evidence that he had sufficient funds to pay the balance due. Plaintiff testified that he had receipts, but he did not know that he had to bring them to court. He also testified that he spoke to numerous city employees who apologized to him for the tax problem, but did not call any employees to testify at trial.

Robert Wells, development specialist for defendant's planning and development department (P&DD), testified that defendant foreclosed on the 8443 Chalfonte property on August 15, 1992, for nonpayment of taxes. The property was returned to defendant's inventory when plaintiff failed to redeem the property within the applicable time frame. A notice was sent to plaintiff indicating that the property would be subject to auction. The parties became to work toward an amicable solution. On December 13, 1996, an offer to purchase was signed by plaintiff. However, this offer provided that the purchase amount was $5327 and contained the following qualification:

> Terms to be as follows: CASH, AS IS, SUBJECT TO … PAYOFF BY 1-16-97. PURCHASER TO PAY $11.00 DEED RECORDING FEE.
>
> City of Detroit to pay all taxes and assessments to date except the current year's City and County taxes, if any, which will be prorated to date of closing.
>
> If offer is accepted by the P&DD and approved [by] the City Council and if the purchaser fails to complete the transaction as specified herein, the deposit shall be forfeited.
>
> This offer is considered as an offer to deal only, and is subject to administrative review by P&DD and formal approval by City Council.

This document was signed by plaintiff only.

Defendant's offer to purchase required supervisory review. Since the offer to purchase was still pending, the property was not pulled from the auction list. The auction was handled by a private company instead of the defendant. At the auction the property was sold to James Crawford for $10,000. After the auction, defendant sent a letter of acceptance dated December 23, 1996, that provided:

> The City of Detroit has accepted your Offer to Purchase the above captioned property. There can be no further action unless the purchase price is paid in full by 1-16-97.

In light of the acceptance of plaintiff's offer to purchase, defendant terminated its deal with Crawford and refunded his $10,000 purchase price. However, plaintiff never performed his obligation by tendering the balance due. On August 1, 1997, defendant returned the deposit check to plaintiff. This litigation occurred after defendant began eviction proceedings. The jury rendered a verdict of no cause of action in favor of defendant.

Plaintiff first alleges that the breach by defendant rendered it impossible for him to perform the contract of December 23, 1996. We disagree. To determine the application of the defense of impossibility, one must examine whether an unanticipated circumstance has made the promised performance vitally different from what was contemplated by the parties at the time of the contract. *Bissell v L W Edison Co*, 9 Mich App 276, 285; 156 NW2d 623 (1967). The circumstances excuse performance only to the extent to which performance is impossible, and the application of impossibility is based on the individual facts of each case. *Id*. at 286. Whether a substantial breach causes an impossibility such that an excuse for failure to perform is permitted presents a question for the trier of fact. *Baith v Knapp-Stiles, Inc*, 380 Mich 119, 126-127; 156 NW2d 575 (1968). It is the function of the jury to resolve credibility issues. *Colbert v Primary Care Medical, PC*, 226 Mich App 99, 103; 574 NW2d 36 (1997).

Plaintiff's contention that the verdict was against the great weight of the evidence based on impossibility is without merit. Upon learning that the supervisor's approval did not occur until after the subject property had been sold, defendant terminated the deal with Crawford and elected to proceed with plaintiff's offer to purchase, despite the fact that the price in the offer to purchase was less than the funds tendered by Crawford. Wells testified that plaintiff never paid the remaining balance after the termination of Crawford's purchase. Plaintiff testified that he was able to pay the funds, but was unable to pay the balance because of the incompetence of defendant's employees. However, plaintiff failed to provide specific details and did not call witnesses at trial to corroborate his assertions. Therefore, this issue involved a credibility contest that the jury resolved in favor of defendant. *Colbert, supra*.

Plaintiff next alleges that the trial court erred in submitting the legal issue of impossibility of performance to the jury.[3] We disagree. This issue is not preserved for appellate review because it was not raised, addressed, and decided by the trial court. *Miller v Inglis*, 223 Mich App 159, 168; 567 NW2d 253 (1997). Additionally, plaintiff allowed this issue to be submitted to the jury. Plaintiff may not deem an act proper at trial and object to the action as improper on appeal. A party may not harbor error as an appellate parachute. *Marshall Lasser, PC v George*, 252 Mich App 104, 109; 651 NW2d 158 (2002). Furthermore, the question of underlying circumstances surrounding the parties' agreement and any excuse for nonperformance was properly submitted to the jury. See *Baith, supra*; *Colbert, supra*.

[3] We note that plaintiff's statement of the question presented states that a *legal* issue for resolution by the trial court was presented. However, later in the brief, plaintiff alleged that the question presented an issue of *fact* to be decided by the trial court.

Affirmed.

/s/ Jessica R. Cooper
/s/ Peter D. O'Connell
/s/ Karen M. Fort Hood