

STATE OF MICHIGAN
COURT OF APPEALS

LONE STAR STEAKHOUSE & SALOON OF
MICHIGAN, INC.,

UNPUBLISHED
April 13, 2004

Plaintiff/Counterdefendant-
Appellee,

V

No. 245002
Oakland Circuit Court
LC No. 02-039689-CK

KATHERINE HAMMOND,

Defendant/Counterplaintiff-
Appellant,

and

ALPHA TITLE AGENCY, INC.,

Defendant.

Before: Wilder, P.J., and Hoekstra and Kelly, JJ.

PER CURIAM.

Defendant-appellant Katherine Hammond ("defendant" herein) appeals as of right from the trial court's orders granting plaintiff summary disposition on its complaint under MCR 2.116(C)(9) and (10), and on defendant's counterclaim under MCR 2.116(C)(8). We affirm.

In July 2002, plaintiff and defendant entered into an agreement whereby defendant agreed to purchase improved commercial property in Farmington Hills for \$1,265,000. Under the terms of the agreement, defendant paid \$126,000 as an earnest money deposit. In September 2000, the parties amended the agreement to extend the closing date until October 31, 2000, in consideration for which defendant paid an additional \$50,000, which was to be applied toward the purchase price upon closing, but would be nonrefundable in the event the transaction did not close. In early November 2000, the parties again amended their agreement to further extend the closing date until November 30, 2000. As consideration for this second amendment, defendant agreed that the \$126,000 earnest money deposit previously paid would not be refundable if she failed to close by the new deadline.

Tragically, defendant's husband died four days before the new closing deadline and defendant was not able to close by the deadline. Defendant asserts that, because of the death of

her husband, she was not able to obtain the necessary financing to complete the transaction. Plaintiff subsequently requested that the trial court enter judgment awarding it the \$126,000 earnest money deposit and the \$50,000 extension payment. The trial court agreed that plaintiff was entitled to these sums as liquidated damages under the parties' agreement, and that the amounts involved were not unreasonable or unconscionable. The court additionally rejected defendant's argument that the purpose of the contract was frustrated due to the untimely death of defendant's husband. The court therefore granted plaintiff summary disposition of both its principal complaint and defendant's counterclaim.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Plaintiff moved for summary disposition of its complaint under MCR 2.116(C)(9) and (10). The standard for reviewing a motion under MCR 2.116(C)(9) is as follows:

When deciding a motion under MCR 2.116(C)(9), which tests the sufficiency of a defendant's pleadings, the trial court must accept as true all well-pleaded allegations and properly grants summary disposition where a defendant fails to plead a valid defense to a claim. *Village of Dimondale v Grable*, 240 Mich App 553, 564; 618 NW2d 23 (2000). . . . Pleadings include only complaints, cross-claims, counterclaims, third-party complaints, answers to any of these, and replies to answers. *Id.* at 565; MCR 2.110(A). Summary disposition under MCR 2.116(C)(9) is proper when the defendant's pleadings are so clearly untenable that as a matter of law no factual development could possibly deny the plaintiff's right to recovery. *Alcona Co v Wolverine Environmental Production, Inc*, 233 Mich App 238, 245-246; 590 NW2d 586 (1998). [*Slater v Ann Arbor Public Schools Bd of Education*, 250 Mich App 419, 425-426; 648 NW2d 205 (2002).]

A motion under MCR 2.116(C)(10) tests the factual support for a claim. When responding to a properly supported motion under MCR 2.116(C)(10), the nonmoving party is required to present evidentiary proofs showing that there is a genuine issue of material fact for trial. In reviewing the motion, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties. MCR 2.116(G)(5). Summary disposition should be granted if, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 455-456 n 2; 597 NW2d 28 (1999); *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995).

Plaintiff moved for summary disposition of defendant's counterclaim under MCR 2.116(C)(8). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the plaintiff's complaint by the pleadings alone. *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). All well-pleaded factual allegations must be taken as true, as well as any reasonable inferences or conclusions that can be drawn from the allegations. *Peters v Dep't of Corrections*, 215 Mich App 485, 486; 546 NW2d 668 (1996). The motion should be granted only if the plaintiff's claims are so clearly unenforceable as a matter of law that no factual development could justify recovery. *Patterson, supra*.

Defendant argues that the liquidated damages provisions in her agreement with plaintiff are unenforceable because the amounts involved, \$126,000 and \$50,000, are unreasonable and unconscionable. We disagree.

In *UAW-GM Human Resources Center v KSL Recreation Corp*, 228 Mich App 486, 508; 579 NW2d 411 (1998), this Court observed:

A liquidated damages provision is simply an agreement by the parties fixing the amount of damages in case of a breach. *Papo v Aglo Restaurants of San Jose, Inc*, 149 Mich App 285, 294; 386 NW2d 177 (1986). Whether such a provision is valid and enforceable or invalid as a penalty is a question of law. *Moore v St Clair Co*, 120 Mich App 335, 339; 328 NW2d 47 (1982). The courts are to sustain such provisions if the amount is "reasonable with relation to the possible injury suffered" and not "unconscionable or excessive." *Id.* at 340, citing *Curran v Williams*, 352 Mich 278, 282; 89 NW2d 602 (1958).

Accordingly, the parties' agreement that plaintiff would be entitled to retain the \$126,000 and \$50,000 payments for defendant's failure to complete the sale may be enforced if these amounts are reasonable in relation to the possible injury plaintiff would suffer and are not unconscionable or excessive.

In support of its motions, apart from submitting copies of the parties' agreements, plaintiff also submitted un rebutted evidence showing that it lost in excess of \$176,000 because of defendant's failure to complete the transaction in accordance with their agreement. Defendant did not challenge this evidence in the trial court. Thus, defendant failed to establish a genuine issue of material fact with regard to whether the \$126,000 and \$50,000 amounts were either unreasonable in relation to plaintiff's actual damages, or unconscionable or excessive. The trial court properly awarded these amounts to plaintiff pursuant to the parties' agreement.

We reject defendant's argument that the liquidated damages provision is unconscionable because she was not represented by counsel during the contract negotiations. Because defendant did not preserve this issue by raising it in the trial court, *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 532-533; 672 NW2d 181 (2003), she must show that plain error affected her substantial rights, *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000). Here, the parties' agreement includes an express acknowledgement that the agreement was reviewed by the parties' respective attorneys. Defendant did not submit any evidence contradicting this provision in the agreement. For this reason, plain error entitling defendant to relief has not been shown.

Defendant also argues that the trial court should have allowed the parties to complete discovery and conduct an evidentiary hearing before making its ruling. Defendant also failed to preserve this issue by raising it before the trial court. *ISB Sales Co, supra*. Nothing in the lower court record suggests that the trial court's ruling was premature or amounted to plain error. *Kern, supra*. Defendant never challenged plaintiff's evidence of its actual damages. Because the evidence of plaintiff's actual damages was un rebutted, an evidentiary hearing was not necessary. Nor has defendant shown that the trial court prematurely granted summary disposition because discovery was not complete.

Defendant argues that her performance under the contract may be excused under the frustration-of-purpose doctrine. As the basis for this argument, defendant asserts that she was relying on her husband's business to assist her in obtaining the necessary financing to complete the purchase, but was unable to obtain this financing when her husband tragically died four days before the closing date. She argues that her husband's untimely death was a supervening event that frustrated the purpose of the contract. We disagree.

This Court recently discussed the frustration-of-purpose doctrine in *Liggett Restaurant Group, Inc v City of Pontiac*, ___ Mich App ___, ___ NW2d ___ (2003), slip op at 3-4:

The doctrine of frustration of purpose and supervening impossibility/impracticability are related excuses for nonperformance of contractual obligations and are governed by similar principles. Frustration of purpose is generally asserted where "a change in circumstances makes one party's performance virtually worthless to the other, frustrating his purpose in making the contract." Under this doctrine, however, there is not anything actually impeding either party's ability to perform.

While the frustration of purpose doctrine has yet to be considered by the Michigan Supreme Court, this Court discussed the doctrine in *Molnar v Molnar* [110 Mich App 622; 313 NW2d 171 (1981)]. In *Molnar*, the doctrine was utilized in connection with a property settlement in a divorce case that required the father to pay partial mortgage payments on the home where his ex-wife and minor son lived. When the child passed away before his eighteenth birthday, a panel of this Court held that the father could discontinue the partial payments to his ex-wife because they were intended for the minor child's benefit. According to *Molnar*, the changed circumstances fundamentally altered the parties' positions and frustrated the purpose for which the property settlement was entered.

Before parties may avail themselves of the doctrine of frustration of purpose, the following conditions must be present:

"(1) the contract must be at least partially executory; (2) the frustrated party's purpose in making the contract must have been known to both parties when the contract was made; (3) this purpose must have been basically frustrated by an event not reasonably foreseeable at the time the contract was made, the occurrence of which has not been due to the fault of the frustrated party and the risk of which was not assumed by him." [*Molnar, supra* at 626.]

"As noted in the Second Restatement of Contracts, '[t]he frustration must be so severe that it is not fairly to be regarded as within the risks that he assumed under the contract.' Further, 'the non-occurrence of the frustrating event must have been a basic assumption on which the contract was made.'" [*Id.* (footnotes omitted).]

Here, because the parties' agreement did not include a contingency clause for financing, defendant assumed the risk that financing might not be obtained when she entered into the contract. It was not unforeseeable at the time defendant entered into the agreement that she

would not be able to obtain financing. Furthermore, defendant has made no showing that plaintiff knew that defendant's purpose for entering into the agreement was related to the financial assistance of her husband. The trial court did not err in granting summary disposition of plaintiff's complaint under MCR 2.116(C)(9) or (10).

We also conclude that the trial court properly granted plaintiff summary disposition on defendant's counterclaim. In her counterclaim, defendant sought to recover the \$176,000 under theories of frustration of purpose and unjust enrichment. Because the parties' agreement expressly addressed the distribution of the funds in question, which we have already concluded were properly awarded to plaintiff under the terms of the agreement, defendant cannot rely upon a theory of unjust enrichment. *Liggett Restaurant Group, supra*, slip op at 6. Further, for the reasons previously stated, defendant has not shown that the frustration-of-purpose doctrine is applicable.

Affirmed.

/s/ Kurtis T. Wilder

/s/ Joel P. Hoekstra

/s/ Kirsten Frank Kelly