STATE OF MICHIGAN

COURT OF APPEALS

RICHARD S. TASCH,

Plaintiff-Appellant,

v

MICHAEL NIEDZIELSKI,

Defendant-Appellee.

UNPUBLISHED
April 27, 2004

No. 246399
Grand Traverse Circuit Court
LC No. 01-021625-CK

Before: Bandstra, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Plaintiff appeals from an order of the circuit court granting summary disposition to defendant on plaintiff's claim for damages arising from a failed real estate transaction. We affirm.

Plaintiff's parents, Richard E. and Lou Anne Tasch, owned property along the west arm of Grand Traverse Bay in Grand Traverse County. The property was adjacent to property owned by John and Ann Rae. In 1959, the two couples entered into a reciprocal option agreement. The agreement provided that if either couple entered into an agreement to sell their property, the other couple would have the first right of refusal to buy the parcel at the same price and on the same conditions of the terms of the bona fide purchase agreement. By 1999, the Raes and Mrs. Tasch were deceased.[1] The Rae heirs offered the Rae property for sale, entering into a purchase agreement with Barry and Diane Eckhold for a selling price of $600,000. Apparently the Rae heirs and the Eckholds were unaware of the reciprocal option agreement until it was discovered during the title search. Notice was then given to Tasch of the pending sale to the Eckholds so that he could either exercise his option or release it.

Tasch consulted with a realtor and, concluding that the property was probably worth more than the selling price to the Eckholds, Tasch sought and obtained a potential purchaser, defendant Niedzielski, with a plan of exercising the option and immediately reselling the property. The purchase agreement between Tasch and defendant, which was dated October 10,

[1] Mr. Tasch died in 2002, apparently assigning his interest in this litigation to his son, plaintiff Richard S. Tasch. References in this opinion to "Tasch" are to the elder Mr. Tasch, not plaintiff.

1999, provided for a selling price of $750,000, with a closing on or before October 22, contingent upon Tasch exercising his option to purchase the property. The agreement further provided that defendant would deposit the purchase price in escrow and that $600,000 of that amount would be released to Tasch to complete his purchase from the Rae heirs under the option agreement.

The October 22 closing never occurred. Rather, Tasch gave notice to the Rae heirs that he would be executing his option to purchase. The Eckholds responded by filing a lis pendens and filed suit in Grand Traverse circuit court seeking specific performance of their purchase agreement with the Rae heirs. The action by the Eckholds caused the closing between Tasch and defendant to be cancelled. Ultimately, the suit by the Eckholds was settled with Tasch paying the Eckholds $9,600 to release their interest in the property under their purchase agreement and to lift the lis pendens.

Further attempts were made to arrange the sale to defendant, including defendant negotiating directly with the Rae heirs. The situation was further complicated by the discovery that the property was in an area designated as high risk for erosion and the Michigan Department of Environmental Quality advised that a permit would have to be obtained before a new home could be constructed on the property. Eventually, defendant indicated that he was no longer interested in purchasing the property. Thereafter, the Rae heirs sold the property to a different purchaser and the instant action was filed seeking damages from defendant for failing to complete the sale. The trial court granted summary disposition to defendant on two grounds: (1) that the purchase agreement between Tasch and defendant terminated when Tasch could not convey marketable title and (2) that the reciprocal option agreement had terminated upon the death of the Raes, thus Tasch did not have an option to exercise when the Eckholds made their purchase offer to the Rae heirs.

Turning to the question whether the purchase agreement between Tasch and defendant had terminated by its own terms, we agree with the trial court that there was no genuine issue of material fact on this issue. Appellate review of a motion for summary disposition is de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

The purchase agreement included the following provision:

> If the owner's title insurance commitment shall disclose title to be unmarketable, then Seller shall remedy the title defects to render title marketable. If Seller does not cure the title defects within 30 days to Purchaser's reasonable satisfaction, Purchaser may waive the defect or may terminate this Agreement by written notice, in which case Selling Broker shall return Deposit in full immediately. This sale is to be closed on or before October 22, 1999.

Defendant's position is essentially that, because the sale did not and could not close on October 22, 1999, because at that point Tasch did not have marketable title, the agreement terminated. Plaintiff, on the other hand, argues that the contract remained in force because defendant never gave written notice of his termination of the agreement. We agree with defendant and the trial court that the agreement automatically terminated on October 22, 1999, when the closing did not occur because Tasch did not have marketable title.

The provision of curing defects in title and the purchaser's right to terminate if the defects are not cured within 30 days is separate from the provision that the transaction must close no later than October 22. The parties agreed to close on or before October 22. Tasch was unable to close on October 22. Therefore, defendant was released from his obligation under the purchase agreement. In other words, what defendant agreed to in the purchase agreement was to buy the property on or before October 22 under the terms outlined in the agreement. When Tasch was unable to meet those conditions (i.e., obtain marketable title) by October 22, the agreement terminated.

This is not to say that the notice provision is necessarily meaningless. Had the parties agreed to a different, later closing date but, in the meantime, a problem with the title had surfaced which Tasch was unable to cure in 30 days, defendant would have had the option to terminate the agreement upon written notice rather than waiting until the date for the scheduled closing. The 30-day time period provides a reasonable time for the seller to cure defects in title, without the purchaser being allowed to renounce the agreement as soon as a title problem surfaces, but also without requiring the purchaser to wait for an unreasonably long period of time without knowing if the transaction can be completed before looking for a different, problem-free property. In any event, and more to the point in this appeal, it does not serve to modify the date chosen by the parties by which the transaction is to be concluded. If the deadline provided for in the agreement is reached and the transaction is not closed, the agreement terminates. If the transaction is not closed due to the fault of a party, that party may be liable for damages. Here, the transaction did not close by the deadline, but not due to defendant's fault. Therefore, defendant is not liable for damages.

In light of our resolution of the above issue and our conclusion that summary disposition in favor of defendant was proper on this ground, we need not consider whether summary disposition was appropriate on the basis that the reciprocal option agreement terminated on the death of the Raes.

Affirmed. Defendant may tax costs.

/s/ Richard A. Bandstra
/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald